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**REPORTS**

**OF**

**CIVIL AND CRIMINAL CASES**

**DECIDED BY THE**

**COURT OF APPEALS**

**OF KENTUCKY.**

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**VOLUME XII.**

**EDWARD W. HINES, REPORTER.**

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**VOLUME 94—KENTUCKY REPORTS,**  
**CONTAINING CASES DECIDED FROM JANUARY 31, 1893, TO OCT. 3, 1893.**

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## In Memoriam.

CASWELL BENNETT.

DIED AUGUST 9, 1894.

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The Court of Appeals met on the 17th day of September, 1894, and the death of Chief Justice Bennett being suggested, the court, of its own motion, adjourned out of respect to his memory.

On the 20th day of September, 1894, Mr. Attorney-General Hendrick presented resolutions adopted by a meeting of the bar of the State of Kentucky, held on Monday, September 17, 1894, and asked that they be spread upon the record, which was ordered to be done.

The resolutions are as follows:

The Hon. Caswell Bennett, late Chief Justice of the Court of Appeals of Kentucky, was born in Virginia, but came early to Kentucky and spent his boyhood and young manhood in the struggle of ambitious and honest poverty for preferment. Upon his admission to the bar, he soon acquired a lucrative practice, and won and held in an eminent degree the confidence and esteem of a generous but discriminating people.

His mind was eminently a judicial one, and it was on his elevation to the bench of the Court of Appeals that the opportunity came, in the full maturity of his powers, for the illustration of his worth as a man, his ability as a lawyer, his breadth and reach as a publicist and jurist.

He had served eight years on the bench of the supreme court of Kentucky, and in that time had left deep impress upon the current of judicial thought and tendencies. As a man he was upright, fearless, true to his convictions, and impatient of wrong and injustice; as a friend, he was loyal to a fault; as a lawyer, careful, wary and resourceful, and as a Judge, patient, learned, industrious and intrepid. In his death the bench and bar of Kentucky have sustained an irreparable loss.

*Resolved*, That this memorial be presented to the Court of Appeals by the Attorney-General, with the request that it be spread at large upon the record, and a copy furnished to the family of the deceased.

# JUDICIAL OFFICERS OF THE STATE.

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## COURT OF APPEALS OF KENTUCKY.

\* HON. ISAAC M. QUIGLEY, CHIEF JUSTICE.

### ASSOCIATE JUSTICES.

HON. WILLIAM S. PRYOR,

HON. JOSEPH H. LEWIS,

HON. JAMES H. HAZELRIGG.

---

## OFFICERS OF COURT.

W. J. HENDRICK, ATTORNEY-GENERAL.

EDWARD W. HINES, REPORTER.

A. ADDAMS, CLERK.

ROBERT L. GREENE,  
WOODFORD W. LONGMOOR, JR., } DEPUTY CLERKS.

W. S. B. HILL, SERGEANT-AT-ARMS.

JOHN W. JOHNSON, TIPSTAFF.

RUSSELL RODMAN, ASSISTANT TIPSTAFF.

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## JUDGES OF SUPERIOR COURT.

HON. J. H. BRENT, PRESIDING JUDGE.

HON. JOSEPH BARBOUR.

HON. WILLIAM H. YOST.

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\* Appointed by the Governor August, 13, 1894, to fill out the unexpired term of Chief Justice Caswell Bennett, who died August 9, 1894.

## \*JUDGES OF CIRCUIT COURTS.

1st District—	HON. N. P. MOSS . . . . .	CLINTON.
2d District—	HON. W. S. BISHOP . . . . .	PADUCAH.
3d District—	HON. JOHN R. GRACE . . . . .	CADIZ
4th District—	HON. CLIFTON J. PRATT . . . . .	MADISONVILLE.
5th District—	HON. M. C. GIVENS . . . . .	MORGANFIELD..
6th District—	HON. W. T. OWEN . . . . .	OWENSBORO.
7th District—	HON. WILLIS L. REEVES . . . . .	ELKTON.
8th District—	HON. W. E. SETTLE . . . . .	BOWLING GREEN.
9th District—	HON. T. R. McBEATH . . . . .	LEITCHFIELD.
10th District—	HON. S. E. JONES . . . . .	GLASGOW.
11th District—	HON. CHAS. PATTESON . . . . .	CAMPBELLSVILLE.
12th District—	HON. WM. CARROLL. . . . .	NEW CASTLE.
13th District—	HON. M. C. SAUFLEY . . . . .	STANFORD.
14th District—	HON. JAMES E. CANTRILL . . . . .	GEORGETOWN.
15th District—	HON. JOHN W. GREEN. . . . .	OWENTON.
16th District—	HON. GEO. G. PERKINS . . . . .	COVINGTON.
17th District—	HON. CHAS. J. HELM. . . . .	NEWPORT.
18th District—	HON. WM. W. KIMBROUGH . . . . .	CYNTHIANA.
19th District—	HON. JAMES P. HARBESON . . . . .	FLEMINGSBURG.
20th District—	HON. S. G. KINNER . . . . .	ASHLAND.
21st District—	HON. JOHN E. COOPER. . . . .	Mt. STERLING.
22d District—	HON. WATTS PARKER . . . . .	LEXINGTON.
23d District—	HON. D. B. REDWINE . . . . .	JACKSON.
24th District—	HON. J. S. PATTON. . . . .	INEZ.
25th District—	HON. THOS. J. SCOTT. . . . .	RICHMOND.
26th District—	HON. W. F. HALL . . . . .	HARLAN C. H.
27th District—	HON. A. H. CLARK . . . . .	BARBOURVILLE.
28th District—	HON. THOS. Z. MORROW.. . . .	SOMERSET.
29th District—	HON. W. W. JONES . . . . .	COLUMBIA.
30th District—		
	HON. W. L. JACKSON, Crim. Division . . . .	LOUISVILLE.
	HON. S. B. TONEY, Law & Eq'ty Division . .	LOUISVILLE.
	HON. I. W. EDWARDS, Chanc'y Division . .	LOUISVILLE.
	HON. EMMET FIELD, Com. Pleas Div. . . .	LOUISVILLE.

\* Elected in November, 1892, for term of five years, beginning January 1, 1893.



### \*COMMONWEALTH'S ATTORNEYS.

1st District—	M. T. SHELBORNE . . . . .	BARDWELL.
2d District—	W. F. BRADSHAW . . . . .	PADUCAH.
3d District—	JAMES B. GARNETT . . . . .	CADIZ.
4th District—	JOHN L. GRAYOT . . . . .	SMITHLAND.
5th District—	J. H. POWELL . . . . .	HENDERSON.
6th District—	J. E. ROWE . . . . .	HARTFORD.
7th District—	JOHN E. BYARS . . . . .	ELKTON.
8th District—	NAT. A. PORTER . . . . .	BOWLING GREEN.
9th District—	WEED S. CHELF . . . . .	ELIZABETHTOWN.
10th District—	D. J. WOOD . . . . .	MUNFORDVILLE.
11th District—	W. H. SWEENEY . . . . .	SPRINGFIELD.
12th District—	R. F. PEAK . . . . .	BEDFORD.
13th District—	JOHN S. OWSLEY, JR. . . . .	STANFORD.
14th District—	JOHN S. SMITH . . . . .	PARIS.
15th District—	M. D. GRAY . . . . .	WILLIAMSTOWN.
16th District—	W. W. CLEARY . . . . .	COVINGTON.
17th District—	M. R. LOCKHART . . . . .	NEWPORT.
18th District—	JACOB T. SIMON . . . . .	CYNTHIANA.
19th District—	JAMES H. SALLEE . . . . .	MATSVILLE.
20th District—	M. M. REDWINE . . . . .	SANDY HOOK.
21st District—	CHAS. W. NESBITT . . . . .	OWINGSVILLE.
22d District—	C. J. BRONSTON . . . . .	LEXINGTON.
23d District—	A. H. HOWARD . . . . .	SALYERSVILLE.
24th District—	R. S. BOUTON . . . . .	PRESTONSBURG.
25th District—	B. A. CRUTCHER . . . . .	NICHOLASVILLE.
26th District—	H. L. HOWARD . . . . .	HARLAN C. H.
27th District—	W. R. RAMSEY . . . . .	LONDON.
28th District—	C. W. LESTER . . . . .	WILLIAMSBURG.
29th District—	J. C. MUNCIE . . . . .	EDMONTON.
30th District—	FRANK PARSONS . . . . .	LOUISVILLE.

\* Elected in November, 1892, for term of five years, beginning January 1, 1893.

DECISIONS  
OF THE  
COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1898.

CASE 1—PETITION ORDINARY—FEBRUARY 2, 1898.

City of Covington v. McDonald, &c.

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APPEAL FROM KENTON CIRCUIT COURT.

**DEDICATION OF STREET.**—Where a sale of lots takes place according to maps showing squares, lots and streets laid out, and such lots are conveyed by deeds describing them as binding on or by designated streets, a dedication may be implied for benefit of purchasers of adjacent lots whose rights thus become involved, whether the municipality has formally accepted the dedication or not; but in this case the lot which embraces the strip of ground claimed by the city as part of a public street was not so described in any of the deeds by which title to it was passed, nor are the rights of purchasers from a common vendor involved. All that can be reasonably inferred from the various deeds and maps is, that an extension of the street of which the strip of ground in controversy is now claimed to be a part might, at some time in future, be made, when the owner could, at his election, dedicate his land for the purpose, or demand compensation; therefore, a dedication can not be implied.

**W. A. BYRNE FOR APPELLANT.**

The evidence is sufficient to show a dedication of the land in controversy as a public street. (Section 2, page 6, of city charter; *E. & P. R. Co. v. Thompson*, 79 Ky.; *Southgate, &c., v. Regenthal*, MS. Op., February 11, 1886; *Gen. Stats.*, chap. 71, p. 687; *Dillon Mun. Corp.*, secs. 686, 688, 640, 642.)

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City of Covington v. McDonald, &c.

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**COLLINS & FENLEY FOR APPELLEES.**

1. There has been no dedication of the land in controversy. There must be not only an intention to dedicate, but an acceptance of the dedication to render it effectual. (*Gedge v. Commonwealth*, 9 Bush, 64; *Wilkins v. Barnes*, 79 Ky., 828.)
2. A street may be dedicated by selling lots abutting thereon, at least for all purposes pertaining to such an easement (*West Covington v. Freking*, 8 Bush, 121); but such is not the case here. Sixteenth street is not mentioned west of Madison street, except where the word "extended" is used, showing there was no intention of recognizing the existence of the street, but simply a statement made that if the street was ever extended its center line would be located as described.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

The act of appellee, McDonald, complained of in this action by appellant, the City of Covington, is the inclosure, as part of his premises, of the southern half of what is claimed to be Sixteenth street, between Madison and Washington streets; and the question involved is, whether the parcel so inclosed is part of a public street.

It appears that in a division of lands of Richard Southgate, made many years ago, a block now lying within the corporate limits of Covington was allotted to Richard H. Southgate, and in 1860 that block was divided between his two sons, Richard H. Southgate and C. F. Southgate, lot No. 1 falling to the latter, who in ——— conveyed it to Clements, under whom McDonald holds by lease for a term of years that was executed in 1887.

There is no evidence of an express dedication of the land in dispute for a public street having ever been made; and such dedication, if established at all, must be by implication from the language of deeds by which the title has been successively passed. On the map of

the lands of Richard Southgate as divided a dotted line was made along the center of what is called Sixteenth street, between Madison and Washington, though it was not designated by name as a street. On the contrary, a note was written on the map to the effect that the survey and calculations were made from the center of streets, supposing that if ever laid out in lots the streets would be extended.

In the report of commissioners who made the division between Richard H. Southgate, Jr., and C. F. Southgate, in 1860, lot No. 1 of block 12, allotted to C. F., is described as beginning at the junction of the center of Sixteenth and Madison streets; thence with center of Madison street southward 225 feet to lot No. 2; thence extending in parallel lines westward 269 feet to a fifty-foot street.

About the same description of lot 1 was given in the deed of partition between Richard H. and C. F. Southgate, and the subsequent deed of the latter to Clements. But the strip of land in dispute is included in all the plats and deeds, and title thereto conveyed to the respective vendees, without any condition or reservation. So that the most that can be implied from the language of the deeds is, that Sixteenth street was recognized as an existing land-mark. It does not, however, follow that part between Madison and Washington, as now claimed by appellant, was so recognized, but rather that part east of Madison, which is now a public street. Up to the time lot No. 1 was leased to and taken possession of by McDonald, it was a common uninclosed, and though Sixteenth street east of Madison may have been used as a public thoroughfare, it had not been so

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City of Covington v. McDonald, &c.

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used west of Madison, nor, except the north half, is it even now fit for use.

It has been held by this court that when a sale of lots takes place according to maps showing squares, lots and streets laid out, and such lots are conveyed by deeds describing them as binding on or by designated streets, a dedication may be implied for benefit of purchasers of adjacent lots whose rights thus become involved, whether the municipality has formally accepted the dedication or not. (Rowan v. Town of Portland, 8 B. M., 237; Wickliffe v. City of Lexington, 11 B. M., 155.) But lot No. 1 was not so described in any of the deeds by which title to it was passed; nor are the rights of purchasers from a common vendor at all involved in this case. On the contrary, lot No. 1 is so described as to include a part of Sixteenth street extended, and in virtue of the deeds title to the parcel in dispute has been conveyed to the purchaser, Clements, as had been done to his vendor; and in such case it must appear there was a dedication by the original or some intermediate proprietor of the land claimed as a street, and that it was accepted by the municipality, otherwise a subsequent purchaser can not be divested of the title or possession. All that can be reasonably inferred from the various deeds and maps is that an extension of Sixteenth street might, some time in future, be made, when the owner could, at his election, dedicate his land for the purpose, or demand compensation. But the evidence in this case shows that at the date of the original division of Richard Southgate's lands, as well as when the partition was made between Richard H. and C. F. Southgate,

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 Baker, &c., v. Kinnaird.
 

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the land described as lot No. 1 was not needed for a public street, and would probably not, if dedicated, have been accepted and appropriated for that purpose by the city of Covington; for though now claiming the parcel in dispute as part of Sixteenth street, it has not been improved by the municipality.

It seems to us very clear there never has been any dedication by Clements, or any of his vendors, of the land claimed by appellant, and the lower court, therefore, properly instructed the jury to find for defendant.

Judgment affirmed.

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 CASE 2—PETITIONS EQUITY—FEBRUARY 2.

### Baker, &c., v. Kinnaird.

APPEAL FROM ADAIR CIRCUIT COURT.

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111	856
94	5
121	749

1. **CONSOLIDATED ACTIONS—DEFENDANTS NOT SERVED WITH PROCESS REGARDED AS BEFORE THE COURT.**—Where an insolvent debtor, subsequent to the execution by him of various mortgages to antecedent creditors with the design to prefer, executed a deed of assignment for the benefit of all his creditors, and in separate actions by the preferred creditors to enforce their mortgage liens, the assignee, by answer, attacked the mortgages as preferences under the statute, these actions by the preferred creditors having been consolidated with an action by unsecured creditors attacking the mortgages as preferences under the statute, the preferred creditors, who were non-residents, must be regarded as before the court in the suit of the unsecured creditors, although there was neither actual nor constructive service of process upon them in that case.
2. **UNLAWFUL PREFERENCE OF CREDITORS—DUTY OF ASSIGNEE FOR CREDITORS.**—Whether or not the assignee could have maintained an independent action to have the mortgages declared to operate as an assignment it was his duty, under the circumstances, to have the question determined as to the validity of these transfers.

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Baker, &c., v. Kinnaird.

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3. **SAME—ACTION BY ONE CREDITOR INURES TO BENEFIT OF ALL.**—A petition filed by one creditor seeking to have an act of the debtor declared to operate as an assignment under the statute, inures to the benefit of all, and any creditor has the right to proceed under it. Therefore, although the petition in this case was dismissed by the creditors who filed it, yet creditors who had been made plaintiffs with them by an amended petition, had the right to prosecute the action, and it is not material whether process on the amended petition was served on the defendants.
4. **SAME.**—Where the indebtedness of a merchant amounted to three times as much as his assets, and his creditors were making a race of vigilance in obtaining securities for their respective claims, one mortgage after another being executed by the debtor, the design to prefer is manifest, and the several transfers must be declared to operate as an assignment under the statute.
5. **SAME.**—A mortgage executed by the debtor to indemnify one who became his surety in the renewal of a note in bank which was overdue, it being recited in the mortgage that it was to inure to the benefit of the bank, must be regarded as a device to prefer the bank, the note being subsequently renewed by the surety in his own name, and the mortgage assigned by him to the bank without any recollection upon his part that he had done so.
6. **MONEY THAT HAS BEEN PAID TO PREFERRED CREDITORS ON THEIR COLLATERALS MUST BE REFUNDED** by them or credited on their claims if the amount does not exceed the sum to which the creditor collecting it is entitled in the distribution of the debtor's estate. They can not be regarded as bona fide purchasers.
7. **A PREFERRED CREDITOR TO WHOM THE DEBTOR'S HOMESTEAD HAS BEEN TRANSFERRED** with other property may retain the homestead, the debtor having the right to dispose of that as he pleased.

#### H. C. BAKER FOR APPELLANT JAMES BAKER.

**As** to \$1,400 of the new note with the accrued interest which went into it, the liability of James Baker was created simultaneously with the execution of the mortgage and upon the faith of it; and as to the other \$600 for which he was bound with others, it, by reason of the change of parties and the execution of a new paper, is also a new liability then and there created, and therefore no part of his claim is within the act of 1856. (Gen. Stat., chap. 44, art. 2, secs. 1, 4; Davis v. Gardner, 1 Bush, 272; O'Neil v. Miller, 2 Bush, 294; Whittaker, &c., v. Garnett, &c., 3 Bush, 411; Terrell, &c., v. Jennings, &c., 1 Met., 459; Thompson, &c., v. Heffner's ex'ors, 11 Bush, 355; McCutcheon & Co. v. Caldwell & Son, 90 Ky., 249.)

#### JAMES GARNETT FOR APPELLANTS.

1. The suits should not have been consolidated. The parties were not

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before the court, and the order of consolidation could not bring them before the court.

2. The assignee for creditors could not bring any suit that the debtor could not have brought, or recover any property that the debtor himself could not have recovered; and as the debtor could not have maintained a suit to vacate the mortgage made to these appellants or to recover the money paid to them, the assignee could not maintain such a suit.
3. Both the assignee and James A. Hamilton, having accepted the assignment and asked that it be upheld and carried out, are estopped from assailing it and repudiating it. (*Handley v. Foley*, 18 B. M., 521; *Cornwall's Heirs v. Mason's Heirs*, 2 Bush, 441.)
4. To bring a case within the act of 1856 the act complained of must be done not only in contemplation of insolvency but with a design to prefer. (*Hampton v. Morris*, 2 Met., 336; *Grimes' Assee. v. Grimes*, 86 Ky., 511; *McAfee v. Bland*, 11 Ky. Law Rep., 2.)
5. While the presumption is that mortgages and payments made by an insolvent debtor to his creditor were made in contemplation of insolvency and with the design to prefer, this presumption is not conclusive but may be rebutted by the circumstances of the transaction. (*Grimes' Assee. v. Grimes*, 86 Ky., 411; *Talbott's Assee. v. Ewalt*, 9 Ky. Law Rep., 908.)
6. The allegations are not sufficient to authorize the judgment requiring appellants to pay to the receiver the amount collected by their attorney on the orders given to him on Shannon. In order to bring these payments within the statute, the same allegations are necessary as are required to bring the mortgages within the statute. The fact that these payments were made after the mortgages were executed does not render the payments void. And in no event could these appellants be required to refund any of said orders for \$500 each, except such part thereof as exceeded the amount of the pro rata that they would be entitled to on their debts and the costs they had incurred in collecting.

## MONTGOMERY &amp; JONES ON SAME SIDE.

- 1 As J. & H. Mann & Co. were not made parties to the suit of the assignee, or to the suit of *Granman & Shuttleworth*, or to the amended petition, and there is not a single allegation made against them in the entire record, the judgment declaring that the transfers to them were acts of insolvency was erroneous. To entitle any creditor to recover against them he should make them parties and make the allegations against them sufficiently specific to authorize a recovery against them just as if they were the only parties to the suit. (*Fuqua v. Ferrell*, 80 Ky., 70; *Southworth v. Casey*, 78 Ky., 895.)
2. The act of 1856 requires that a party attacking a conveyance or trans-



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fer under the act must file his petition within six months *and* cause a summons to issue or a warning order to be made (10 Bush, 98; Civil Code, sec. 89). And if the non-residents in these cases did enter their appearance by the order of consolidation it had been more than six months after the acts complained of and could not avail appellees, Kinnaird, &c., any thing.

3. The allegations as to each act complained of must be made as specifically as if the suit had been originally brought on that act. The making of a sale or payment is not *ipso facto* void, but is voidable only at the election of creditors made by petition filed within six months. (Fuqua v. Terrell, 80 Ky., 70; 3 Met., 539; 11 Bush, 210.)

In this case there is no statement made in the pleadings in regard to the \$500 paid Bamberger, Bloom & Co., and the court erred in adjudging them to pay back that amount; and in adjudging that Rindskopf, Stein, Lauer & Co. should return the \$250 paid them, even if they were before the court.

4. The design to prefer will be inferred from a payment by an insolvent debtor, but the circumstances accompanying it may show plainly that there was no motive or thought of giving an advantage or preference, and then the presumption is repelled. (Grimes' Assee. v. Grimes, 86 Ky., 511.)

J. E. McMURTRY OF COUNSEL ON SAME SIDE.

LEWIS McQUOWN FOR APPELLEES.

1. Where an assignee for creditors has knowledge that certain creditors have been favored and provided for by his assignor to the detriment of the mass of general creditors, it is not only his *right* but his *duty* to have the transfers declared within the act of 1856, and thus secure equality. As he represents and stands for the creditors no estoppel applies. (Burrill on Assignments, § 392.)

The statute does not confer an exclusive benefit on the plaintiff. He only starts the proceeding, and then it is "subject to the control of a court of equity" for the purpose of equally distributing the estate. (Gen. Stat., chap. 44, art. 1, sec. 2; Sawyers v. Langford, 5 Bush, 539.)

2. All the necessary allegations and proof having been made against the creditors who were ordered to refund, there can be no question as to the power of the court to so adjudge. (Fuqua v. Ferrell, 80 Ky., 69.)
3. Where a debtor knowing that he is insolvent, in order to give a particular creditor a preference, executes a mortgage to secure a debt or liability already created, together with a liability simultaneously created, and the creditor, knowing the true state of case, aids the arrangement, he is not a mortgagee in good faith to secure a liability

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simultaneously created, and obtains no preference over other creditors. (*McCann v. Hill*, 85 Ky., 574.)

4. The bank as the assignee of James Baker and Baker himself can not avail themselves of any homestead claim that Hamilton may have had in the mortgaged property. Hamilton does not claim the exemption and Baker and the bank can not claim it for him.

R. B. DOHONEY ON SAME SIDE.

1. The facts in proof show conclusively that Hamilton, at the time he assigned the collateral notes to W. H. Newman & Co. and Jno. M. Robinson & Co., Oct. 2, 1888, knew he was insolvent, and knowing that fact must, under the law, have designed to prefer said creditors. (*Temple, Barker & Co. v. Poyntz*, 2 Duv., 276; *Applegate v. Murrell*, 4 Met., 28; *Thompson v. Heffner's Ex'r*, 11 Bush, 359.)
2. All of Hamilton's property of every kind passed by operation of law to the use and benefit of all his creditors on the 2d day of October, 1888, six days before the bank mortgage was executed. Hence that mortgage, so far as it attempted to convey title to or create a lien on Hamilton's property, was absolutely void. (*McCann v. Hill*, 85 Ky., 579.)
3. James Baker and William Hamilton, under the bank mortgage, held the legal title of the homestead in trust for the general creditors. (*Cantrill v. Risk*, 7 Bush, 159; *Gideon, Burton & Co. v. Struve and Wife*, 78 Ky., 134.)
4. The assignee had the right to prosecute the suit brought by him. He is an "interested" party within the meaning of the statute. (*McKee v. Scobee*, 80 Ky., 127.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This appeal is brought here from a judgment of the Adair Circuit Court, adjudging that certain transfers of property, real and personal, by W. M. Hamilton, were within the act of 1856, and operated to pass the estate to his creditors.

That Hamilton, at the date of the first transfer of certain notes and accounts to John M. Robinson and others as collaterals, to secure his indebtedness to them, was much involved in debt, more than three times the value of his assets, as appears from the testimony, and that his creditors were making a race

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of vigilance in obtaining securities for their respective claims, the written conveyances of his land and assignments of his personalty, found in this record, clearly evidenced.

If there is such a thing as bringing a case within the equity of this statute, and to carry into effect its purpose, this is the case, and there are too many reported cases sustaining the validity of this statute and its equitable provisions to now bring the matter in question, and no stronger case has ever been presented to this court than the one before us.

This debtor, in his insolvent condition, on the second of October, 1888, assigned to Newman & Co. and to Robinson & Co. a large part of his notes and accounts (he being a merchant) as collaterals to secure the payment of certain debts he owed. On the sixth of the same month, within four days from this transfer, he executed a mortgage to Sutcliffe & Owen on twenty-one mules and other property to secure their debt. On the eighth of the same month he executed a mortgage to Bamberger, Bloom & Co. and other merchants on several tracts of land and some cattle to secure an indebtedness to each firm, and on the same day he executed to James Baker and William Hamilton a mortgage to secure a debt to the Bank of Columbia. This was on his homestead and store-house and other property. In November he executed a mortgage to Keith & Barlow on some of the same property, and a mortgage to a Cincinnati firm on his stock of goods, &c., and finally the debtor made an assignment of all his estate for creditors on the 22d of February, 1889. His creditors were not only seeking a preference, but

the debtor was willing to gratify them, and with a view of giving the preference, and in contemplation of insolvency, he executed the assignments and mortgages as already stated.

The testimony as to the object in view is irresistible, and the testimony of the debtor and creditors combined, to the effect that no such purpose was contemplated, would not be sufficient to repel the presumption arising from the acts of the parties that the purpose of the creditors was to obtain the preference, and that of the debtor to give it, and in contemplation of insolvency. It is needless to discuss the facts of the case. The bare statement is sufficient to sustain the judgment below.

The action was brought originally by the assignee, J. W. Kinnaird, to have the various transfers and conveyances to operate as an assignment to creditors. The action was brought on the 8th of March, 1889. On the 28th of March, 1889, Shuttleworth and others, the assignee among them, instituted an action as individual creditors to have these various transfers declared as acts of insolvency, making the same averments as was made by the assignee. The action by the assignee was dismissed on the ground that he had no right to maintain such an action, or on the ground that two actions, one by the creditors and one by the assignee, could not be maintained. The parties elected to abide by the creditors' action, and under that this proceeding was had. It is, therefore, not necessary to decide whether the action could have been maintained by the assignee, the estate of the debtor having passed by operation of law to the creditors. It was the duty, however, of the

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assignee, under the circumstances, to have the question settled, as the appellants were claiming, in their independent actions, that the property belonged to the debtor, and, if so, it devolved upon him to see that the creditors were protected, and to administer the estate under the assignment. The creditors had filed their independent actions, and were asserting their right to enforce their liens upon all the mortgaged property, and to have the collateral paper held by them as security for their debts sold. The assignee set up the fact, and particularly in the case of Mason, &c., the non-residents, to the effect that the transfers and mortgages were in contemplation of insolvency, and with the design to prefer, and without objection the cases were all consolidated with the action by the creditors. It is now claimed that as they were not warned as non-residents, and had not made an actual appearance to the creditors' bill, they were not before the court. They were seeking to subject, in an independent action, property they claimed belonged to the debtor, and in the creditors' suit was claimed to belong to the creditors. The assignee of the debtor, by an answer, had set up the same facts as alleged in the creditors' petition, for the purpose of having determined to whom this property belonged, and when the case is decided adverse to the appellants they complain that they had not appeared in the action or been summoned. This is a technical view of the question, and is too late, even if available, to be made here. The assignee had made the question directly by his answer; the evidence, without objection, had been heard in the consolidated cases, was considered by

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the court, and that an appearance must be regarded under the circumstances admits of no doubt.

The petition filed by Grauman & Shuttleworth was dismissed by them, but before the dismissal Kinnaird and Hamilton, who were both creditors, were made plaintiffs with them by an amended petition. This amended petition was filed on the same day the original petition was filed and process issued. There was a motion to quash the summons because it was blank. No blank summons appears here, nor is there any thing showing that the summons issued before the amended petition was filed. The petition, however, by Grauman & Shuttleworth inured to the benefit of all the creditors, and any creditor had the right to proceed under it, and whether the amendment was filed or not is immaterial. An order was entered to the effect that the dismissal was not to affect Kinnaird and Hamilton. Kinnaird was a creditor, if Hamilton was not, and the case was permitted to progress as it should have been for all the creditors; and the act of insolvency occurring on the 2d of October, 1889, all the transfers of real and personal estate and collections made from and after that date by reason of the transfers and in payment of these debts passed to the creditors. The only question to be considered in this case is as to the priority allowed the Bank of Columbia or James Baker for the fourteen hundred dollars embraced in the renewal note to the bank for paper past due. This mortgage to the bank, or to James Baker, was made when act after act of insolvency had been committed. The execution of the mortgage and the pledges of collaterals were known to the bank when the mortgage to James Baker was executed.

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James Baker lived in the same town with the debtor—they were friends—indorsed for each other, and there was no reason for James Baker going on this paper, or when going upon it requiring security in the way of mortgage, except to secure himself on the six hundred dollar note for which he was already liable. The president of the bank had left his town and gone to the village in which the debtor lived, demanding security on the over-due paper; prepared a mortgage that James Baker knew but little about, and reciting that it was to enure to the benefit of the bank. Baker, after this, renews the note to the bank in his own name and assigns the mortgage to the bank without even recollecting that he had done so, showing an utter indifference to this assumed liability that was evidently resorted to for the purpose of placing the bank on a secure footing. That this was a race by creditors to obtain precedence and secure their debts owing by an insolvent debtor, is too apparent from the testimony to be controverted, and equally manifest that the transaction with James Baker and the debtor was to secure the bank's debt by a renewal, that brings that case clearly within the purview of the act of 1856, if it stood alone in this controversy. There was no actual fraud on the part of the bank president and James Baker, but such an effort as every creditor of a failing debtor will resort to for the purpose of saving his debt; but such acts as the law now stands only places the creditor on an equality with all the rest, and to prevent such preference the statute was enacted.

The money that has been paid to the creditors on

collaterals must be refunded or credited on the claims, if the amount does not exceed the sum to which the creditor collecting it is entitled.

We are aware of the cases cited of Southworth v. Casey, reported in 78 Ky., 395, and Fuqua v. Ferrell, 80 Ky., 69. In the first case the debtor, before suit was brought, sold some of his property to a *bona fide* purchaser, and obtained the money, and this court held that parties who purchased in good faith could not be compelled to surrender the property, because the statute provides that the court shall compel every person acquiring by purchase, assignment or otherwise, property or effects of the debtor after the suit contemplated by that act shall be instituted, to surrender the same to the receiver. The question decided in that case does not arise here, for the reason that none of the estate of the debtor was purchased in good faith; but all the collaterals and mortgages taken to secure antecedent debts by an insolvent debtor with the design to prefer, and the sums of money collected by the creditor from the collaterals is the money the chancellor requires refunded. The debtor has paid no money, as in the case of Fuqua v. Ferrell, but the creditor has collected it from the pledged estate, which pledge was an act of insolvency within the statute. In other words, there are no *bona fide* purchasers in this case, and while they are *bona fide* creditors, they have brought themselves within the statute by obtaining the preferences already referred to. *Bona fide* creditors are not protected unless the debt and mortgage are simultaneously created and executed before suit brought, without knowledge of the contemplated



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insolvency and the design to prefer. So these cases have no application here.

The judgment below is affirmed on the original and reversed on the cross-appeal as to James Baker and the bank. They must come in like any other creditor, except as to the homestead; this the debtor had the right to dispose of.

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CASE 3—APPEAL TO CIRCUIT COURT—FEBRUARY 4.

Commonwealth for Greenup County v. Chesapeake and Ohio Railway Company.

APPEAL FROM GREENUP CIRCUIT COURT.

1. **RESULTING TRUSTS.**—Where a deed to land is made to one person, and the consideration paid by another, no trust results in favor of the person paying the consideration, the law as to resulting trusts having been changed by statute in this State.
2. **SAME—STATUTE OF FRAUDS.**—Even under the equitable rule as to resulting trusts, a verbal agreement by the holder of the legal title to land that another shall be interested in the title, or an agreement to buy land from a stranger for the benefit of another without that other paying the consideration, comes directly within the statute of frauds, and does not create an enforceable trust. Besides, in this case the evidence fails to establish the alleged agreement by the holder of the legal title to buy the land for the benefit of another.
3. **EXEMPTION FROM TAXATION.**—A railroad company having agreed, as a part of the consideration for the use of land leased by it for a thousand years, to pay the taxes on the land, a statute exempting its property from taxation for five years from the completion of its road does not exempt it from the payment of taxes on the leased property during that time. But the lessor may be compelled to list the property for taxation unless the lessee gives it in.

**BEN. E. ROE FOR APPELLANTS.**

1. It was not error in the county court to order the land listed in the name of Woodruff and Julia W. Anderson, although the legal title

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was not in them at the date of which the assessment was made, as the State and county had a lien for the taxes which could not be defeated. Besides, the possessionary control of Woodruff and Julia W. Anderson would have been sufficient to authorize the assessment of the property in their names. (Gen. Stats., chap. 92, art. 1, secs. 2, 6, 7; *Idem*, art. 6, secs. 15, 16, 22, 25; *Commonwealth v. Gaines & Co.*, 80 Ky., 489.)

2. If the railroad company is the equitable owner of the land as claimed, it is equally as liable for the tax. The act of April, 1884, exempting railroads from taxation is unconstitutional, because it destroys that uniformity and equality of taxation which our organic law requires.

**W. H. WADSWORTH & SON, B. F. BENNETT FOR APPELLEE.**

The property sought to be subjected to taxation by this proceeding is railroad property, the railroad company being the equitable owner, and the statute has provided a different method from this proceeding for the assessment for taxation and the collection of taxes on such property. (Gen. Stats., chap. 92, art. 3.)

**COCHRAN & SON AND WADSWORTH & SON IN PETITION FOR REHEARING.**

The proceeding should have been against C. H. Coster, and against him alone, he alone being the owner of the property on September 15, 1889, and under an obligation at that time to list it for taxation for the year 1890, and for this reason, if for no other, the lower court was right in dismissing the action. The proceedings authorized by the statute are criminal in their nature, and for that reason must be against the person who owned the property at the time it should have been listed. (Gen. Stats., chap. 92, art. 6, secs. 15, 16, 17, 22, 25; *Idem*, art. 1, sec. 6; *Evans v. Commonwealth*, 18 Bush, 269; *Lincoln County Court v. L. & N. R. Co.*, 3 Ky. Law Rep., 486; *L. & N. R. Co. v. Commonwealth*, 85 Ky., 198.)

**JUDGE BENNETT DELIVERED THE OPINION OF THE COURT.**

The sheriff of Greenup county reported to the Greenup county court that J. C. Woodruff and Julia W. Anderson owned a certain tract of land lying in said county, which they had leased to the Chesapeake and Ohio Railroad Company, and which property had not been "assessed for taxes due for 1890." The said parties were summoned to appear, &c. Thereafter, J. C. Woodruff and Julia W. Anderson were

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proceeded against as non-residents of the State, and the Chesapeake and Ohio Railroad Company and the Maysville and Big Sandy Railroad Company entered their appearance, the latter named road claiming to be the lessee of the former. A trial of the case resulted in a judgment ordering the clerk of the court to assess the property in the name of Woodruff and Anderson, except a small portion that the Chesapeake and Ohio Railroad was entitled to, and which was not assessed, presumably upon the ground that the same was exempt by statute for the period of five years, which time had not expired. The railroads appealed to the circuit court, and that court reversed the judgment of the county court and dismissed the action, upon the presumable ground that the legal title to the whole tract of land was in Woodruff and Anderson, as trustees of the Chesapeake and Ohio Railroad Company, and as said company held the equitable title and possession, the property was exempt from taxation under said statute.

The record facts as to the purchase, ownership and lease of said property are as follows: That C. H. Coster, of New York, purchased the land from A. A. Meade at the price of thirty-two thousand dollars, paying his own money therefor. He then leased the property to the Chesapeake and Ohio Railroad Company for the term of one thousand years, for an annual rental of sixteen hundred and fifty dollars, to be paid in monthly installments, and that said company was to pay all taxes and charges on the land that might come against it, in addition to the yearly rental. That Woodruff and Mrs. Anderson finally

acquired this property by purchase, paying their own money for it, and they leased the property to the Chesapeake and Ohio for the same time and on the same terms indicated above, and that the Chesapeake and Ohio Railroad Company then leased the same property to the Maysville and Big Sandy Railroad Company for one hundred years, at a rental of sixteen hundred and fifty dollars per year and the payment of the taxes. There is no expression indicating a trust in any of said conveyances. But the appellees, the railroad companies, attempt to establish a trust by the following verbal agreement: That the Chesapeake and Ohio Railroad Company, wishing to purchase said property for the purposes of its road, and not having the money with which to pay for it, applied to C. H. Coster to loan it the money and take a mortgage on the land to secure the payment, which he agreed to do; but in order to avoid circuitry and complication, he was to pay for the land with his own money and take an absolute deed to himself, and then lease the land to said company for the term of one thousand years at an annual rental of sixteen hundred and fifty dollars, an amount equivalent to interest at the rate of five per cent. per annum, and the payment of all taxes and charges in addition. That the subsequent conveyances were made with the same understanding and agreement. It is claimed that this verbal agreement as to the loan of said money and the deed, absolute on its face, should be held to be only a mortgage to secure the same, and created an enforceable trust, and which gave the appellees the equitable title to said land.

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There is an equitable principle prevailing in many States, and which used to exist in this State, that in the sale of land, if the deed was made to one person, and the consideration was paid by another, the holder of the legal title would hold it in trust for the person paying the consideration, upon the "principle that the right of property should result to the source of the consideration." But by section 19, article 1, chapter 63, General Statutes, it is declared that such transaction vests no trust in favor of the person paying the consideration. But leaving the statute out of view, and admitting that the equitable rule is in force in this State, it is clear that the facts of this case do not come within the rule; for it is clear that the appellee paid no part of the consideration, but Coster and the subsequent vendees paid the respective considerations with their own money; and it is well settled that in such case no enforceable trust can result, for, as said, the foundation of a resulting trust of this nature is the payment of the consideration by a person other than the person to whom the deed is made. A verbal agreement by the holder of the legal title that another shall be interested in the title, or he buys the land from a stranger for the benefit of another, without that other paying the consideration, comes directly within the statute of frauds, and creates no enforceable trust. (See notes to *Dyer v. Dyer*, 1 vol.; *White & Tudor's Leading Cases in Equity*, pages 336-7.) Besides, it seems that, under the circumstances, the evidence of the witness that is relied on to establish this trust is not sufficient for that purpose; for the written leases all fix the term of lease at one thousand years, except

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that to the Maysville and Big Sandy, at an annual rental of one thousand six hundred and fifty dollars, which sum does not pay exceeding five per cent. interest per annum. Now the question arises, when and how would the lessors get their principal at the end of the thousand years? How would the fact be established?

The truth, from the evidence, seems to be that Coster purchased the land at the suggestion of the Chesapeake and Ohio Railroad Company as an investment, relying upon said railroad company to lease it at a rental that would pay a reasonable interest, and the payment of the taxes and other charges in addition. The lessors are bound to pay the taxes on the land from the dates of their respective purchases, and the Chesapeake and Ohio Railroad Company agreed to pay the taxes and other charges upon the land as a part of the rental consideration; and to allow it to escape the payment of the taxes for the period of its five years' exemption would, in effect, allow it to violate one of its terms of lease, and put the burden of the taxes for said period upon the lessors without remedy, which that company, by the terms of the lease, can not do; for its obligation to pay the taxes is contractual, and commences from the date of the lease, in order that the lessors may have the full benefit of the contract. It seems that the entire property should be assessed by Woodruff and Anderson for the year 1890, and continuously thereafter, unless it is given in by said company without reference to its exemption, in which case Woodruff and Anderson may not be required to give it in for taxes.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

Vanmeter v. Spurrier, &c.

CASE 4—PETITION ORDINARY—FEBRUARY 4.

Vanmeter v. Spurrier, &c.

APPEAL FROM HARDIN CIRCUIT COURT.

1. **CONSTITUTIONAL LAW—TITLE OF ACT.**—An act, entitled "An act to regulate the sale of fertilizers in this Commonwealth, and to protect the agriculturist in the purchase and use of the same" (Gen. Stats., chapter 42a, 650) relates to but one subject, and that is expressed in the title.
2. **SAME—DOUBLE TAXATION.**—As the fees which the statute authorizes to be collected from any person selling or offering to sell a commercial fertilizer, are intended to be used for the single purpose of maintaining the Experiment Station, they can not be regarded as taxes, and do not render the statute liable to the objection that it imposes double taxation.
8. **SAME—INTER-STATE COMMERCE.**—The statute can not be construed to authorize a levy of an impost on inter-State commerce beyond what is necessary to insure inspection.
4. **A CONTRACT PROHIBITED BY STATUTE WILL NOT BE ENFORCED**, and it is not necessary that there should be an express prohibition in order to render the contract void; as a general rule the fact that a penalty is attached implies a prohibition.  

A contract for the sale of a fertilizer not labeled as required by the statute is void, although such a sale is not expressly prohibited. The penalty fixed for selling without having complied with this requirement implies a prohibition; it being manifest that the statute was enacted for the purpose of protecting the public against the fraudulent sale of goods and not for the purpose of raising revenue.
5. **THE ATTACHING OF THE REQUIRED LABEL TO EACH PACKAGE OF FERTILIZER IS NECESSARY** to constitute a compliance with the provisions of the statute. It is not sufficient that a sample of the fertilizer has been analyzed by the Experiment Station.
6. **ONE WHO PURCHASED A PACKAGE OF FERTILIZER WITHOUT THE REQUIRED LABEL BEING ATTACHED** has not been damaged by the failure of the seller to comply with the statute, as he has used the fertilizer without paying for it; and he can not, therefore, recover any thing upon his counter-claim in this action to recover the purchase price of the fertilizer.

**J. H. VANMETER, CHIEF, SPRIGG AND HOBSON & O'MEARA**  
FOR APPELLANT.

1. Where a statute pronounces a penalty for an act, a contract founded on

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such act is void, although the statute does not pronounce it void, or in express words prohibit it. (5 Lawson on Rights, &c., sec. 2398; 1 Parsons on Contracts, 456; Collins v. Merrell, 2 Met., 164; Vannoy v. Patton, 5 B. M., 248; Creekmore v. Chitwood, 7 Bush, 818; Slade v. Arnold, 14 B. M., 287; Murphy v. Thompson, 14 B. M., 419; Franklin Ins. Co. v. L. & A. Packet Co., 9 Bush, 590; Woods v. Armstrong, 54 Ala., 150; s. c., 25 Am. Rep., 671; Cove Guano Co. v. Dowling, 85 Ala. 142; Johnson v. Hanover, &c., Bank, 88 Ala., 271; Allen v. Pearce, 80 Ga., 417; Allen v. Pearce, 84 Ga., 607; McConnell v. Kitchens, 20 S. C., 430; s. c., 47 Am. Rep., 845; Spurgeon v. McIlwain, 6 Ohio, 442; s. c., 27 Am. Dec., 266; Dillon v. Allen, 46 Iowa, 299; s. c., 26 Am. Rep., 145; Ingersoll v. Randall, 14 Minn., 400; Bach v. Smith, 2 Wash., 145; Ludlow v. Hardy, 38 Mich., 690; Pitrel Guano Co. v. Jarnette, 25 Fed. Rep., 677; Bicket v. Chatterton, 13 R. I., 299; s. c., 43 Am. Rep., 80; Schmidt v. Barker, 87 Am. Dec., 531.)

2. It was error to allow plaintiffs to prove by witnesses that they bought the same brand of fertilizers from plaintiffs in September or October, 1888, and got good results. (Stephen on Evidence, p. 17, art. 10; 1 Greenleaf on Evidence, sec. 52; Delano v. Goodwin, 97 Am. Dec., 601; Wentworth v. Smith, 82 Am. Dec., 228; Dutton v. Ware, 43 Am. Dec., 590; Bliss v. Wilbrahan, 8 Allen, 565; Raymond v. Lowell, 109 Mass., 127; Roundtree v. Smith, 108 U. S., 269.)
3. If the fertilizer was sold for use on the wheat crop, and was not as represented, and thereby the defendants sustained a loss on their wheat, they should recover for this on their counter-claim, and the measure of damages would be the value of the wheat lost by reason of the fertilizer being defective, and falling short of the warranty. (White v. Miller, 71 N. Y., 168; s. c., 27 Am. Rep., 18; 79 N. Y., 398; s. c., 34 Am. Rep., 544; Wyck v. Allen, 69 N. Y., 71; s. c., 25 Am. Rep., 136; Poland v. Miller, 95 Ind., 387; s. c., 43 Am. Rep., 730; Wolcott v. Mount, 36 N. J., 262; s. c., 13 Am. Rep., 438, and note; 38 N. J., 496; s. c., 20 Am. Rep., 425; Bell v. Reynolds, 78 Ala., 511; s. c., 56 Am. Rep., 52.)

**CHARLES G. RICHIE FOR APPELLEES.**

1. The infliction of a penalty does not necessarily make a contract void, but the question is one of legislative intention. (Smith on Contracts, 256; Wetherill v. Jones, cited therein; Lindsay v. Rutherford, 17 B. M., 806; Harris v. Runnels, 12 How., 79; Vining v. Bricker, 14 Ohio St., 331; Niemeyer v. Wright, 75 Va., 239; Learned v. Andrews, 8 Am. Rep., 346; Combs v. Emery, 14 Me., 404; Strong v. Darling, 9 Ohio, 201.)
2. The fertilizer act (chapter 42a, General Statutes) is unconstitutional, because—

*First.* It relates to more than one subject, and the title does not



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truly express the scope of the act. (Constitution of 1849, article 2, section 37.)

*Second.* It taxes fertilizers twice for a single purpose, and the taxation is not uniform. (Cooley on Taxation, p. 165; Livingston *et al.* v. City of Paducah, 80 Ky., 660.)

*Third.* It levies an impost on inter-State commerce beyond what is necessary to secure inspection. (Constitution of United States, art. 1, sec. 10; Brown v. Maryland, 12 Wheat., 419; Robbins v. Taxing District, 120 U. S., 489; Asher v. Texas, 128 U. S., 129; State Freight Tax Case, 15 Wal., 282; American Fertilizer Co. v. Board of Agriculture, 43 Fed. Rep., 612.)

**JAMES MONTGOMERY ON SAME SIDE.**

1. The statute is unconstitutional. (Hall v. De Cuir, 95 U. S., 485; Chylung v. Freeman, 92 U. S., 275; State v. Constitution, 42 Cal., 578; Lyng v. State, 135 U. S., 161.)
2. The mere fact that the statute imposes a fine does not render the contract void. The fine was regarded as a sufficient punishment. (Murphy v. Thompson, 14 B. M., 420; Solomon v. Drescher, 4 Minn., 278; Babcock v. Goodrich, 47 Cal., 509; Coombs v. Emery, 14 Me., 409; Lester v. Howard Bank, 33 Md., 538; Niemeyer v. Wright, 75 Va., 239; American Fert. Co. v. Board Agr., N. C., 48 Fed. Rep.; Lindsay v. Rutherford, 12 B. M., 306; Vannoy v. Patton, 5 B. M., 248; Hunter v. Cobb, 1 Bush, 239; Creekmore v. Chitwood, 7 Bush, 318.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

Appellees Spurrier & Bading, assignees, brought this action on a note given October, 1888, to the Thompson & Edwards Fertilizer Company, by appellants, Vanmeter and others, the consideration being commercial fertilizer, sold and delivered in sacks to the purchasers. Two distinct grounds of defense are stated in the answer, which is also made a counter-claim:

1. That plaintiffs represented the commodity to be valuable and good for wheat, but that it turned out to be, after being properly applied, and was, in fact, worthless as a commercial fertilizer, and consequently the note is without consideration.

2. That by reason of non-compliance of the sellers

with provisions of "An act to regulate the sale of fertilizers in this Commonwealth, and to protect agriculturalists in the purchase and use of the same," approved April 13, 1886, the note is void and unenforceable.

As an issue of fact in respect to the first alleged ground of defense was made by the pleadings, and submitted to and determined by the jury in favor of the plaintiffs, we will not here consider it.

The statute mentioned is substantially as follows:

SEC. 1. On or before the first day of May of each year, before any person or company shall sell, offer or expose for sale in this State, any commercial fertilizer whose retail price is more than ten dollars per ton, said person or company shall furnish to the director of the Agricultural Experiment Station, inaugurated by the Agricultural and Mechanical College of Kentucky (which Station is here recognized as the "Kentucky Agricultural Station"), a quantity of such commercial fertilizer, not less than one pound, sufficient for analysis, accompanied by an affidavit that the substance so furnished is a fair and true sample of a commercial fertilizer which said person or company desires to sell within this State.

SEC. 2. It shall be the duty of said director to make or cause made a chemical analysis of every sample of commercial fertilizer so furnished him, and he shall print the result of such analysis in the form of a label; such label shall set forth the name of the manufacturer, the place of manufacture, the brand of the fertilizer and the essential ingredients contained in said fertilizer, expressed in terms and manner approved

by said director, together with a certificate from the director, setting forth that said analysis is a true and complete analysis of the sample furnished him of such brand of fertilizer; and he shall also place upon each label the money value of such fertilizer, computed from its composition, as he may determine. The director shall furnish such label in quantities of five hundred or multiple thereof, to any person or company desiring to sell, or expose for sale, any commercial fertilizer in this State.

SEC. 3. Every package of any commercial fertilizer whose retail price is over ten dollars per ton, sold or offered for sale in this State, shall have attached to it in a conspicuous place a label having a certified analysis of a sample of such fertilizer from said director as provided in the foregoing sections.

SEC. 4. Any manufacturer or vendor of any commercial fertilizer who shall sell, offer or expose for sale, any fertilizer without having previously complied with the provisions of this act hereinbefore set forth shall, upon indictment and conviction, be fined one hundred dollars for each violation or evasion of this act, which fines shall be paid into the State Treasury.

SEC. 5. The director shall receive for analyzing and affixing his certificate the sum of fifteen dollars; for labels furnished, one dollar per hundred.

Section 6 requires the director to pay all such fees into the treasury of the Agricultural and Mechanical College of Kentucky, to be used "in meeting the legitimate expenses of the Station, in making analysis of fertilizers, in experimental tests of the same, and in such other experimental work and purchases

as shall inure to the benefit of the farmers of this Commonwealth." The director is required to report to the Commissioner of Agriculture the work done by him, and itemized statement of receipts and expenditures. And among other provisions of section 7 is one authorizing any agriculturist, purchaser of a commercial fertilizer, to forward a sample of same to the Experiment Station for analysis, free of charge.

Counsel for appellees contends, for various reasons we will now consider, that the statute is unconstitutional.

1. We do not see wherein the statute violates that clause of the Constitution requiring each law to relate to but one subject, and that to be expressed in the title; for there is no provision that we are able to discover which does not have a natural connection with the subject of the title, and relate, directly or indirectly, to it.

2. Equally groundless is the objection that it imposes double taxation; for the fees authorized to be collected from a person or company selling, or offering to sell, a commercial fertilizer are intended to be used for the single purpose of supporting and maintaining the Experimental Station, and are not, in proper meaning of the term, taxes at all.

3. The statute can not be fairly construed to authorize, in the language of counsel, a levy of an impost on interstate commerce beyond what is necessary to insure inspection; nor is the language of section 6 susceptible of the meaning counsel gives it. The statute, as its title indicates, was enacted for protection of farmers of this Commonwealth against fraud and imposition of

those having for sale commercial fertilizers. To accomplish that object, each one selling, or offering to sell, any fertilizer is required to submit a sample for analysis and test of its quality at the Experimental Station. For that purpose only can the fees collected by the director be used, and in that way and to that extent only can farmers of the Commonwealth be benefited by the statute. In our opinion the law is valid in every respect.

It is admitted that the retail price of the fertilizers sold to appellants was worth over ten dollars per ton, and that no one of the packages had attached to it when sold the label required by section 3 of the statute; and the main question, therefore, is, whether the contract sued on is, by reason of such non-compliance with and disregard of the statute, void and unenforceable.

It is too well settled for argument that a contract prohibited by statute will not, nor should be, enforced by the court. But whether a contract has been prohibited sometimes depends upon construction of such statute when not clear in meaning, and we will at present assume such is this case.

In Benjamin on Sales, volume 2, 712, the following two propositions are stated to be fairly deducible from the authorities:

“*First.* That when the question is whether a contract has been prohibited by statute, it is material in *construing the statute* to ascertain whether the Legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts,

or the promotion of some object of public policy. In the former case, the inference is that the statute was not intended to prohibit contracts, in the latter, that it was.

*"Second.* That in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealings, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

Tested by either one of these rules, the statute in question would have to be construed as intended to prohibit the contract in case of non-compliance with or breach of its provisions. For the Legislature had in view, when enacting it, not the security and collection of the revenue even partly, but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is expressly provided in section 4 the fine shall be imposed for each violation or evasion of the act.

In *Lindley v. Rutherford*, 17 B. M., 248, the following proposition, stated in *Chitty on Contracts*, was referred to with approval: "A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any

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other object." But it was, nevertheless, there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license under penalty of a fine; the court being of opinion the statute was intended to raise revenue, not to strike a blow at the business.

But neither the conclusion in that case nor reason for it affects the question before us; for there is a marked difference between a statute, the prime or sole purpose of which is to secure or raise revenue by a license tax, and one enacted to protect the public against fraudulent sale of goods, or for other reason of public policy. To prohibit a contract in one case when the business is known and recognized to be otherwise lawful and legitimate, is not essential to the main purpose, which is to raise revenue by a license tax. But to do so in the other class of cases is essential to the main purpose, whether it be to prevent fraudulent sale of spurious and hurtful commodities, to secure the public health or protect public morals.

That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided not only by this court, in *Lindley v. Rutherford*, but by numerous courts in England as well as in this country. In *Woods v. Armstrong*, 54 Ala., 150, 25 Am. Rep., 671, the same question arose as the one before us, and as to construction of a statute enacted for the same purpose and in all respects like the one we are now considering,

and the contract was held void. There, upon authority of a previous case in the same court, the proposition of law already referred to was thus stated: "It has been repeatedly determined that a penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even when it is not expressly declared by the statute that the contract shall be void."

In *McConnell v. Kitchen*, 20 S. C., 430 (47 Am. Rep., 845), was determined the proper construction and meaning of a statute like the one in question, and it was held that "when a merchant sold a fertilizer without a tag stating its chemical composition, &c., as required by the statute under penalty, and took a note for the purchase money, he could maintain no action on the note."

Under a similar statute in Georgia it was likewise held an action could not be maintained for purchase price of a fertilizer sold by a merchant who had violated provisions of the statute; and such must be the logical conclusion from the legal propositions referred to, which are sustained by courts and text-writers generally.

Counsel for appellee call our attention to the cases of *Harris v. Runnels*, 12 Howard, 79, and *Niemeyer v. Wright*, 75 Va., 239. But in the first case it was said that "where the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void;" and in the other it was conceded "that as a general rule a contract founded on an act forbidden by a statute under a penalty is void, although it be not ex-



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pressly declared to be so;" and the decision of the case turned upon the meaning of the various parts of the statute, which, considered together, in opinion of the court, authorized the conclusion the Legislature did not intend to avoid a contract made in contravention of it. But there can be, we think, no question of the intention of the Legislature in this case; for in language too plain to be misunderstood the statute makes compliance with each provision thereof an indispensable condition of the right of any person or company to sell, offer or expose for sale in this State any commercial fertilizer, retail price of which is more than ten dollars per ton; and according to what rule of government or administration of justice a party who has refused to comply with that condition can ask enforcement of a contract so distinctly prohibited, we are unable to see.

It appears from the evidence that a sample of the fertilizer was analyzed by the Kentucky Agricultural Experimental Station in January, 1888, and it is contended the statute was thereby substantially complied with. But no record of the analysis is required by the statute to be kept by the director; nor is there any other way provided by which the fact of analysis can be made known to a purchaser, or preserved as a guide or check, except by means of the label upon which a certified analysis is required to be placed. It seems to us the attaching of the label to each package is essential to accomplish the purposes of the statute, and its provisions can not be regarded as complied with without the label being so attached.

The defendants, in their counter-claim, ask for dam-

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ages, but it is hard to see how they have been damaged, in view of the fact they have used the fertilizer and paid nothing for it.

Wherefore the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

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CASE 5—PETITION EQUITY—FEBRUARY 7.

Brannin, Brand & Glover v. Broadus, &c.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

- I. THE PLAINTIFF IN AN EXECUTION MAY LEAVE A SPECIFIC BID WITH THE OFFICER WHICH THE LATTER MAY CRY without violating section 2, article 15, chapter 38, General Statutes. which simply prohibits him in his own behalf from buying or bidding for property at his own sales.
2. EXECUTION SALES—CONVEYANCE OF LAND PURSUANT TO PRIOR CONTRACT—EQUITY.—Where an execution defendant conveyed to his mother a tract of land upon which the execution had been levied, one who, in good faith, purchased the land from the mother prior to the sale under the execution, and who at no time had any notice of the levy or the sale, is entitled to equitable consideration, having acted in perfect good faith. And while the deed executed by the execution defendant to his mother, although executed pursuant to a prior written contract, by which he had agreed to thus discharge a debt he owed her, was inoperative to defeat the demand of the plaintiffs in the execution; yet as it was not in fact fraudulent, it conferred an equitable interest on the grantee, and in this action by the execution plaintiffs, the purchasers at the execution sale, to set aside the deed and to quiet their title, while the deed may be set aside, it must be done on equitable terms and with due regard to the rights of the innocent grantee and those claiming under her; and as the judgment of the Chancellor setting aside the execution sale and giving a prior lien to the plaintiffs on the land for their debt effects that end, it will be affirmed.

STONE & SUDDUTH FOR APPELLANTS.

When the bid cried by the sheriff is made by letter, message or otherwise, by a person who does not attend the sale, of a specified  
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amount, thus depriving the sheriff of any discretion in the matter, the sale is valid. It is only where the sheriff is instructed in such manner as to leave it to his discretion as to the manner of bidding and the amount, that the sale should be set aside. (Freeman on Executions, sec. 292; Dickerman v. Burgess, 20 Ill., 267; Scott v. Mann, 36, Tex., 157; Rorer on Judicial Sales, sec. 745; Mullins, &c., v. Buskirk, &c., MS. Op., Jan. 19, 1884)

**WOOD & DAY FOR APPELLEES.**

1. The sale by the sheriff in which he bid in the land is void. (Stapp v. Toler, 3 Bibb, 450.  
And this is true, although he bid as the agent of another. (Dixon v. Sharp, 1 A. K. Mar., 211.)
2. The equity of Mrs. Broaddus and Kash was prior to that of appellants, and Mrs. Broaddus having obtained the legal title, their equity was more meritorious than appellants', and the court should have dismissed appellants' petition. (Bettis v. Allen, 10 Bush, 40)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The sheriff of Montgomery county, on August 13, 1885, levied an execution in favor of Brannin, Brand & Glover against John R. Broadus on the undivided interest in remainder of the defendant in a tract of some one hundred and fifty-two acres of land, and after due advertisement sold the same, on September 21, 1885, to the plaintiffs in the execution. The life estate was owned by Mrs. C. A. Broadus, and the interest of defendant, who was her son, was the one undivided one-fifth therein. The plaintiffs in the execution, who are the appellants here, were not present at the sale, either in person or by attorney, but prior to the day of sale their attorney said to the deputy sheriff, "that when he offered said interest for sale under said execution to cry the amount of plaintiffs' bid for the amount of their debt on the day of sale for the whole of said interest, if no one else would

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bid that amount for same, and to knock it off to plaintiffs if no one else would bid that amount for it."

The sheriff did as directed. The purchase price of the land was less than two-thirds of its appraised value, and after the expiration of a year the appellants caused the sheriff to make them a deed therefor. This was made on the 11th day of April, 1887. The value of the whole tract, as shown by the investment under the orders of the Madison Court of Common Pleas, was about seven thousand five hundred dollars, and the defendant's interest, not estimating the value of the life tenancy of his mother, who was about sixty-eight or sixty-nine years of age in 1889, was worth some one thousand five hundred dollars. The plaintiffs' bid was three hundred and two dollars and eighteen cents.

On the 17th of September, 1885, the defendant in the execution, J. R. Broadus, who was then living in Owen county, Kentucky, came to Montgomery county, and without notice, as he alleges, of the issual of the execution or its levy, conveyed to his mother, Mrs. C. A. Broadus, his interest in the land, and in this conveyance recites that it was made in pursuance of a written contract, dated September 15, 1884, binding himself to convey said land to her by reason of certain considerations passing between them. He had rented the entire tract from his mother in 1883, for which he was owing her something; and again in 1884, and for this year owed her some six hundred dollars. It is evident that after applying some credits for sale of crops, he owed her in the fall of 1884 some five or six hundred dollars; and the writing referred to in

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the deed of September 17, 1885, was executed as a "security" for said rental, or a deed for the interest in case he did not pay the rent.

The deed of September 17, 1885, was indorsed on its back, "Acknowledged by J. R. Broadus September 17, 1885, Priest, clerk. Tax paid September 18, 1885—T. P. Priest, clerk, by J. C. Brown, D. C."

It was brought to the clerk's office by an attorney, who paid the tax, and who told the clerk that he would come in afterwards and order it recorded if he wished it recorded, and he appears in this record as attorney for Mrs. C. A. Broadus. The alleged written contract of September 15, 1884, the existence and date of which is somewhat confusedly testified to by J. R. Broadus, was burned, it is claimed, with the house on said farm in September, 1884; and notwithstanding the request of the mother to that effect, no deed was made to her in pursuance of that writing until September 17, 1885, as shown above.

On November 11, 1885, the appellee, L. C. Kash, by written contract, bought the entire tract of one hundred and fifty-two acres from Mrs. C. A. Broadus for the sum of seven thousand five hundred dollars, of which he was to pay, on January 2, 1886, one thousand five hundred dollars, and to execute his notes, due in one, two, three and four years, respectively, and was to have a deed therefor upon making the first cash payment, which he did, and obtained a conveyance as provided for. He obtained possession of the lands as tenant in March, 1885, and says that more than two months before the execution of the writing of November 11, 1885, he bought the land by an oral

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purchase from Mrs. Broadus, who had become the owner in fee of said land, and that he was in the actual adverse possession thereof from that time on, and had no notice whatever of the levy on the land or its sale under any execution. His four notes for one thousand five hundred dollars each, payable to Mrs. Broadus on March 1, 1887, 1888, 1889 and 1890, were all paid by G. W. Goodpaster on the 19th of July, 1888. Goodpaster appears to have bought the land from Kash, and hence paid the unpaid purchase money notes to J. G. Trimble, the owner of them by purchase from Mrs. Broadus.

Upon this state of case the appellants, Brannin, &c., brought this action in equity on March 16, 1886, against J. R. and C. A. Broadus, and to their suit Kash was subsequently made a party-defendant, asking that the deed of September 17, 1885, of J. R. to Mrs. C. A. Broadus, be set aside as fraudulent; that their purchase under the execution sale of September 21, 1885, be upheld, and their right and title to said interest be quieted; and praying further, if this relief be refused, that the execution sale be set aside, and their judgment debt be adjudged unsatisfied.

The defendants set up their claims and equities as foreshadowed herein, and upon preparation and hearing the chancellor adjudged that the deed from defendant J. R. to C. A. Broadus of September 17, 1885, was fraudulent and void as the plaintiffs, that the plaintiffs, by their purchase at the execution sale of September 21, 1885, took nothing, and that the deed of the sheriff to them was void and passed no title, but adjudged plaintiffs a prior lien on said inter-

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est by virtue of their levy, and ordered a sale for their benefit.

From this judgment Brannin, &c., have appealed, because their purchase under the execution sale was not sustained, and they were not given the land; and Kash, Goodpaster, &c., complain, by cross-appeal, because the deed of September 17, 1885, from J. R. to C. A. Broadus, was set aside as fraudulent.

The legal inability of the sheriff to cry the bid of the plaintiffs in the execution, and the consequent nullity of the deed made by him in pursuance of such bid, is sought to be established on the authority of *Stapp v. Toler*, 3 Bibb, 450, where a sheriff himself bought a slave sold under an execution sale made by him. The sale was held invalid in the absence of a statute to that effect, by reason of the obvious absurdity and palpable incongruity of the sheriff uniting in himself the inconsistent characters of both seller and purchaser, and it may be added that such a transaction would now be in direct conflict with section 2, article 15, chapter 38, General Statutes, which provides that "no officer shall directly or indirectly bid for or buy any property which may be sold under an execution by his deputy or principal, or by his co-deputy."

But is this a case where the officer either bids or buys the property in the meaning of the statutes? Does it not mean bid or buy for himself? The case of *Dixon v. Sharp*, 1 A. K. Mar., 211, is also relied on by appellees and is nearer in point. It was there held that a sheriff could not bid for a purchaser at a sale of land made by him; but this court commented on that case in *Mullins, &c., v. Buskirk*, decided on

January 19, 1884, and held that where the sheriff was authorized by a letter from the plaintiffs in the execution to bid or cry the debt, interest and costs for the land, if no one else did so, the bid was one made by the parties themselves and not by the sheriff, and the crying of the bid, as authorized, was neither a violation of the letter or spirit of the statute.

In this case the authorization was not in writing, but was none the less specific and direct. No discretion was given the sheriff in crying the specified bid. He was not left to bid as much or as little as he pleased, as we infer may have been the case in *Dixon v. Sharp, supra*. It does not appear that Sharp in that case made any bid, or left any with the sheriff, or authorized the sheriff to make any for him.

We perceive no reason why a plaintiff may not leave a specific bid with the officer which the latter may cry without violating a statute which simply prohibits him, in his own behalf, from buying or bidding for property at his own sales.

It is laid down in *Freeman on Executions*, section 292, that this doctrine that a sheriff can not act as agent for another in making a sale, "was not to be extended to cases where he is authorized to offer a specified amount in behalf of the absent bidder."

But in this case, while the strictly legal right obtained by plaintiffs might be upheld as indicated, the appellees show themselves to have been without notice of the levy in the country, and sale of the property, and to have bought and paid for same upon the apprehension that it equitably belonged to Mrs. C. A. Broadus under her written contract with J. R. Broad-



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us, of September, 1884, and the legal title to which was attempted to be perfected by the conveyance of September 17, 1885.

The appellee, J. R. Broadus, while he was indefinite as to dates, testified most earnestly to the good faith manifested by the parties, and to the fact that the writing was in existence so securing his mother, but was burned in 1884. And while such proof may not be sufficient to raise a prior equity in behalf of appellees as against the appellants' purchase, yet the facts and circumstances showing good faith on their part entitle them to equitable consideration. This is a suit in equity, and we are not disposed to hold that the deed of September 17, 1885, was, in fact, fraudulent, and conferred no equitable interest on the grantee, although certainly inoperative to defeat the plaintiffs' demand.

While the deed may be set aside at the suit of the appellants, it must be done on equitable terms, and with due regard to the equities of the innocent grantee therein, and the parties holding under her.

The judgment of the chancellor, giving a prior lien to the appellants on the interest in question for the full amount of their debt, interest and costs, effects this end, and will, therefore, be affirmed.

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Lee, &c., v. Marion National Bank, &c.

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## CASE 6—PETITION EQUITY—FEBRUARY 7.

## Lee, &amp;c., v. Marion National Bank, &amp;c.

## APPEAL FROM MARION CIRCUIT COURT.

**TAX COLLECTOR—CONTROL OVER MONEY COLLECTED—RIGHTS OF SURETIES.**—A sheriff, as collector of railroad taxes, had absolute control of the money collected by him, and neither the county nor the sinking fund commissioners had any right to interfere with any disposition he might choose to make of the particular money collected by him from time to time, the remedy being on the bond. Therefore, a bank in which he had the money on deposit had the right, with his consent, to apply it to the payment of a debt he owed the bank, and the sureties in his bond who have been compelled to answer for his default can not require the bank to account to them for the money.

**J. P. THOMPSON FOR APPELLANTS.**

The account of A. K. Russell, collector, was a fiduciary account, and the alleged arrangement between the bank and Russell by which the private debt of Russell was to be liquidated out of that fiduciary account was unlawful. (Addison on Contracts, sec. 824.)

**W. J. LISLE FOR APPELLEES.**

Russell simply deposited his money in bank as any other ordinary depositor, and the uncontradicted proof is, that as a depositor he directed this money to be applied to the payment of a balance due on his seven thousand dollar loan. But the bank had the right, even without Russell's direction, to make this appropriation, the bank being the holder of the note. (Morse on Banking, vol. 2, sec. 559.)

The sureties of Russell had no lien on this money collected and deposited by Russell. (Clore v. Bailey, 6 Bush, 77.)

The fact that it was tax money, and the bank knew, or ought to have known, it was tax money, does not alter the case. (McAfee v. Bland, 11 Ky. Law Rep., 3.)

All deposits are loans. The identity of the particular money is lost. (Williams v. Rogers, 14 Bush, 787; Taylor v. Taylor, 78 Ky., 470; Addison on Contracts, sec. 817; Morse on Banking, vol. 1, sec. 289.)

A banker can not excuse his disobedience to his customers' orders in due course of business by setting up that he knew, or had reason to believe, that the customer's order was given in promotion of an unlawful purpose, or that the customer is going to make a fraudulent

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use of the funds. (Morse on Banking, vol. 1, sec. 317; *Wetherell v. O'Brien*, Superior Ct. of Ill., Jan. 18, 1892, reported in *Chicago Law Journal* for January, 1892.)

As Marion county could not maintain the suit appellants are trying to prosecute, there is no equity to which they can be substituted.

**KNOTT & EDELEN ON SAME SIDE.**

Cited: *Patterson v. Pope*, 5 Dana, 241; *Rice v. Downing*, 12 B. M., 44; *Havens v. Foudry*, 4 Met., 247; *F. & D. Bank v. Sherley*, 12 Bush, 304; *Story's Eq. Jur.*, note 4 to sec. 499c.; *Clare v. Bailey*, 6 Bush, 77; *Fishback v. Bodman*, 14 Bush, 117; *Commonwealth v. Tate*, 89 Ky., 606; *McAfee v. Bland*, 11 Ky. Law Rep., 1.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

A. K. Russell was sheriff of Marion county for the years 1885-6, and in virtue of his office collector of revenue and county levy. He was also, for the years 1887-8-9, collector of taxes to pay semi-annual interest, falling due in April and October, on bonds executed by the county for amount of its subscription to the capital stock of the Cumberland and Ohio Railroad Company; also a certain amount to the sinking fund for ultimate extinction of the principal.

Not having a sufficient amount of taxes collectible for the year 1888 to pay interest coupons then due, amounting to nine thousand dollars, he, in April, 1889, borrowed from appellee, Marion National Bank, the sum of seven thousand dollars, giving his individual note with security therefor, which was used by him to make up the deficiency.

In October, 1889, he paid to appellee one-half the note, and in April, 1890, the residue, which was about thirty-five hundred dollars.

This action was instituted by appellants, sureties on the bond given by him as collector of the railroad

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taxes for the year 1889, to recover back from appellee said sum of thirty-five hundred dollars paid by Russell, April 15, 1890, in discharge of balance of the note or applied by appellee for that purpose.

It appears that Russell commenced May 11, 1889, to deposit with appellee railroad taxes, as he had deposited revenue and county levy taxes from 1885. But the two deposit accounts were kept distinct until January 1, 1890, when the balance in his favor of revenue and county levy taxes collected after his term of office as sheriff expired, was added to his deposit account of railroad taxes, and but one deposit account was thereafter kept, which was that of collector.

The simple question in this case is whether the amount on deposit with Marion National Bank to the credit of Russell as collector, thirty-five hundred dollars of which the former used to pay balance of the note, was, at the time, subject to order and control of Russell. For if it was, then he had the right to use it, or authorize Marion National Bank to apply so much as necessary to pay residue of his note. By terms of the bond of Russell, as collector, in which appellants were sureties, he covenanted to pay so much money at specified times, whether then collected or not, or if collected, whether used by him for other purposes or not. In the meantime he had absolute control of the money collected by him, which he might, at his election, deposit in a bank to his credit as collector or in person, subject to his check, retain in his own possession or invest in property. And neither the county or sinking fund commission-

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ers had any right to control or interfere with any disposition he might choose to make of the particular money collected by him from time to time; the remedy being on the bond. It would seem, therefore, to naturally result that the Marion County National Bank had the right to use the money deposited by Russell in discharge of a debt he owed, just as well as to apply money of any other debtor for a like purpose. No fraud in the transaction is either proved or alleged, nor does Russell complain. The transaction was entirely legitimate, and the money was paid by Russell, or applied by the bank with his consent, in payment of a debt, the validity or justice of which is not questioned. The sureties of Russell might, by proper proceedings in equity, have attached or otherwise prevented Russell using the money after being collected and deposited for other purpose than in discharge of his obligation on the bond as collector; but even in that case appellee, we think, would have had the right to apply the money in discharge of the note. But this action was not brought until after the note of the bank had been paid, and by reason of default of Russell, the sureties had, as they allege, been compelled to satisfy the bond to the extent of Russell's failure to do so.

It appears that the cashier of the bank was also treasurer of the sinking fund. But that fact does not seem to us to make any difference. For if Russell had control of the fund on deposit out of which the note was paid, it was not in the power of the sinking fund commissioners to prevent him using it for that purpose.

Judgment affirmed.

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Imboden v. Cully.

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CASE 7—APPEAL TO CIRCUIT COURT—FEBRUARY 9.

## Imboden v. Cully.

## APPEAL FROM CRITTENDEN CIRCUIT COURT.

1. AN APPEAL LIES FROM THE DECISION OF THE CONTESTING BOARD OF ELECTIONS at the instance of any person in interest feeling himself aggrieved; and the fact that upon the decision of the contesting board finding the vote to be a tie, the right to office was determined by lot, as provided by statute, does not deprive the unsuccessful candidate of the right of appeal from the decision of the board by which the vote was found to be a tie.
2. THE FINDING OF THE LOWER COURT THAT A CERTAIN VOTER WAS OF LEGAL AGE will not be disturbed, the testimony being conflicting, and especially when the preponderance of the proof sustains the decision.

## BLUE &amp; BLUE FOR APPELLANT.

1. Appellee, having consented to the settlement by lot, was estopped from asserting any further right to the office, and under the circumstances the circuit court had no jurisdiction to review the decision of the contesting board.
2. The court erred in sustaining the vote of Thomas Kemp, as the evidence shows he was not twenty-one years of age at the time of the election.

## F. J. IMBODEN OF COUNSEL ON SAME SIDE.

## NUNN &amp; CRUCE FOR APPELLEE.

Brief not in record.

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The right to the office of justice of the peace in Bell's Mines precinct, in Crittenden county, Kentucky, is involved on this appeal. Cully, the appellee, over his objection, was deprived of four votes, on the ground of alleged illegality, by the contesting board of elections, and when his total vote was counted after it was thus reduced the vote between his opponent, Imboden, and himself was found to be a tie. Whereupon the

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right to the office was determined by lot in the following manner, namely: "Ten slips of paper were prepared, each having a number written on them, folded up, and placed in a hat, and well shaken; after which A. J. Pickens was selected by the contestant, and H. A. Haynes for the contestee, to draw out said slips;" and it appeared from a count of said drawing that the contestant "had drawn fifty-three and the contestee forty-eight in number, which gave the contestant, Imboden, the greatest number by five." He was thereupon adjudged to be duly entitled to the office by said board. Cully appealed from this decision to the Crittenden Circuit Court, and there he was adjudged to be entitled to one of the four votes denied him by the lower tribunal, and was, therefore, declared elected by a majority of one vote. Imboden now brings the case to this court, insisting that Cully "having agreed to this method of settling the question as to his right to said office, is thereby estopped from asserting any further right," and that the circuit court had no jurisdiction of his appeal. We do not so understand the law.

We do not find that the appellee made any agreement on the subject. The law pointed out the course to be pursued in case of a tie, and the board adopted it. The circuit court, under the express language of the statute (section 6, article 7, chapter 33, General Statutes), is given jurisdiction on appeal from the decision of the board, at the instance of any person in interest feeling himself aggrieved.

The board had deprived Cully of four votes; he felt "himself aggrieved" thereby, and had a clear right of appeal.

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The appellant also insists that the vote of Thomas Kemp, which was counted for appellee in the circuit court, was an illegal vote. Kemp himself proves that he was born on July 4, 1869, and was, therefore, twenty-one years of age in July before the election. It may be true, as seriously asserted by counsel of appellant, that this is hearsay testimony; it could not well be otherwise; but he is corroborated by Taylor, one of the judges of the election, who had known him since his birth, and who knew that he was born in 1869, because it was the year witness had moved to the place on which he then lived. That he was born in 1870 was testified to by an uncle of Kemp, who compared his age with that of his daughter; but we can not upturn the finding of the lower court on the facts of the case, especially when the preponderation of the proof sustains the decision.

The judgment is affirmed.

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CASE 8—PETITION EQUITY—FEBRUARY 9.

## Louisville Water Company v. Clark, Sheriff.

### APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. JUDICIAL AND MINISTERIAL ACTS.—Those duties of a public officer are ministerial in the performance of which he is vested with no discretion, even though such performance requires exercise of discretion. But where such officer may exercise both discretion and judgment as to how a duty is to be performed, the performance of the duty is judicial, though being at the same time ministerial.
2. CORRECTION OF ASSESSMENT BY COUNTY COURT.—Under the revenue law as it existed prior to the law of May 17, 1886 (sec. 2, art. 7, chap. 92, Gen. Stat., old edition), the county court had jurisdiction to correct



**Louisville Water Company v. Clark, Sheriff.**

assessments in every case where it appeared that a person was charged with any tax or county levy for which he was not legally bound, and the judgment or order of the court correcting or vacating the assessment was not a ministerial, but a judicial act, and until reversed or vacated, was conclusive as to the legality of the assessment.

As an order of the county court vacating an assessment of appellant's property for the years 1882 to 1885 inclusive, upon the ground that the property was exempt from taxation, has never been set aside or reversed, the sheriff has no authority to collect the taxes assessed.

3. **SAME.**—The fact that at the time the order was made by the county court vacating the assessment, there was pending in the chancery court an action to recover the taxes assessed, did not render the order of the county court void, as the chancery court had no jurisdiction of the subject of that action.

**T. L. BURNETT, LANE & BURNETT, WILLIAM LINDSAY  
FOR APPELLANT.**

- Section 2 of article 7 of chapter 92 of the revision of 1878 is not only constitutional, but it confers an exclusive jurisdiction upon the county court, and the judgments and orders of the county court in the exercise of this jurisdiction are binding and conclusive until set aside by appropriate proceedings on appeal. (*City of Louisville v. Commonwealth*, 1 Duv., 295; *Commonwealth v. The Louisville, &c., R. Co.*, 89 Ky., 141.)

The Louisville Law and Equity Court had no jurisdiction of the suit to collect taxes (*Louisville Water Co. v. Commonwealth*, 89 Ky., 244); therefore the pendency of that suit did not oust the county court of jurisdiction. (*Quinnebang v. Tarbox*, 20 Conn., 510; *Reynolds v. Harris*, 9 Cal., 388; *Durand v. Canington*, 1 Root, 358; *Longham v. Thomasson*, 57 Texas, 127; *Phillips v. Quick*, 68 Ill., 324.)

**HELM & BRUCE FOR APPELLEE.**

1. Section 2 of article 7, chapter 92, General Statutes (edition 1878), was not intended to confer judicial power upon the county court, and therefore the action of that court is not conclusive.
2. The court had power under the statute to *correct* an erroneous assessment—none to *vacate*—and therefore the order vacating the assessment was void.
3. The person applying is not entitled to the benefit of the court's action *unless* and *until* a certificate of the fact is delivered to the sheriff, which was not done in this case.

A person who makes a claim to be freed from a public burden makes it in derogation of the common right, and his claim will not be allowed unless it is shown to be clearly well founded beyond the question of a doubt. (*Vicksburg, &c., R. Co. v. Dennis*, 116 U. S., 667.)

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Louisville Water Company v. Clark, Sheriff.

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4. There was, at the time this suit was brought, no bar to the right to assess property for taxation. (Lou. & Nash. R. Co. v. Commonwealth, 1 Bush, 250; Commonwealth v. Masonic Temple Co., 87 Ky., 349.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT**

The Louisville Water Company, a corporation, brought this action November, 1889, for injunction restraining Wm. Clark, sheriff of Jefferson county, levying on and selling its property for satisfaction of State revenue taxes claimed by him to be due for each of the years 1882-3-4-5, which it was alleged in the petition he was about to do. Reversal of the judgment of the lower court dissolving the injunction and for payment of the sum of taxes claimed, is contended for upon two grounds:

*First.* That by an act of the General Assembly, approved April 22, 1882, the Louisville Water Company was, in terms, exempted from payment thereafter of all taxes, State, municipal and special.

*Second.* That by judgment of the Jefferson County Court, November 12, 1885, the assessment of appellant's property for taxation, for the years named, was vacated and set aside.

In 1885 the sheriff, the Commonwealth being united as plaintiff, brought an action asking that the Louisville Water Company be compelled to show cause why it should not, within a given time, pay the same taxes now in question into court, and upon its failure to do so that a receiver be appointed. But upon appeal from the judgment which was rendered according to prayer of the petition, this court, without passing upon any other defense, held that in absence of ex-

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Louisville Water Company v. Clark, Sheriff.

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press legislative authority, the taxes could not be recovered by suit, and a reversal followed. (Louisville Water Co. v. Commonwealth, 89 Ky., 244.)

In 188— the property of the company having been assessed for taxes for the year 1887, and the sheriff being about to sell it therefor, an action like this was instituted for an injunction, which was, by judgment of the lower court, perpetuated. But that judgment was reversed by this court upon the ground the act of April 12, 1882, exempting property of the company from taxation was, as held by a majority of the court, unconstitutional. (Clark, Sheriff, v. Louisville Water Co., 90 Ky., 515.) And upon appeal to the Supreme Court of the United States, the decision was affirmed. But that court did not directly pass upon or decide as to validity of the act of April 12, 1882; the question mainly discussed, and upon which the decision was rendered, being whether, according to a proper construction of an act of May 17, 1886, the act of April 12, 1882, was repealed thereby, and if so, whether the Legislature had power to repeal it; both of which questions were determined affirmatively. (Louisville Water Co. v. Clark, Sheriff, 143 U. S., 1.)

There is, however, contention by opposing counsel in this case about the meaning and effect of the opinion of the Supreme Court in regard to the validity of the act exempting property of the company; but we do not deem it now necessary to inquire whether that opinion does in fact or was intended to conflict with the one of this court in same case, because it seems to us the judgment was erroneous as to the second ground of defense.

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It is stated in the petition, without denial, that July 20, 1885, the sheriff of Jefferson county reported in writing to the county court clerk that the property of the company not having been previously assessed for taxation for any of the years named, he, the sheriff, then valued and assessed it for each of said years at the sums mentioned in the report, which was, on that day, filed in the office of the county court clerk; that on notice to the sheriff the company, October 12, 1885, moved the Jefferson County Court to correct as erroneous and vacate the said assessment, upon the ground that the property of the company was not liable to, but exempt from, taxation; that the Commonwealth and sheriff appeared by attorney, and objected to the motion, which was, November 12, 1885, heard and tried by the county court, and then, and by said court, judgment was rendered and entered of record that the property of the company was, in virtue of the act of April 12, 1882, exempt from liability for taxation in any form, and a copy of that judgment, attested by the clerk of the court, was ordered to be delivered to the sheriff of Jefferson county as a credit on and against said assessment. The effect of that judgment, if effectual for any purpose at all, was to nullify the assessment which the sheriff undertook to make, and consequently there existed no authority whatever for the sheriff or any other officer to collect any taxes from the water company for the four years in question, much less to levy on and sell property for that purpose; for the power of the sheriff to collect taxes must be preceded by a legal assessment and ascertainment of amount to be collected from each taxpayer.

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Louisville Water Company v. Clark, Sheriff.

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Two questions, therefore, arise: First, whether the county court was at that time invested by statute with authority to pass upon legality of the assessment made by the sheriff against the company; second, whether his judgment or order made in respect thereto was judicial or ministerial.

Section 2, article 7, chapter 92, General Statutes, then in force, is as follows: "A person improperly charged with any tax or county levy, before he has paid the same may make proof thereof to the county court in which the assessment was made, and the court may correct the same. A certificate of the fact by the clerk, if delivered to the sheriff, shall exonerate the person from the payment of so much as may be decided to be a wrongful assessment; which certificate, if produced, shall entitle the sheriff to a credit for the amount in his settlement with the Auditor."

As a copy of that judgment was ordered to be delivered to the sheriff, the presumption is the duty was performed. Besides, the sheriff being a party to the proceeding, had notice thereof, and could have obtained credit in his settlement with the Auditor.

It seems to us very clear it was intention of the Legislature to invest by that section the county court with authority to do more than merely to examine the tax-book and correct errors of the assessors in relation to valuation of property listed, which duty was, by article 6, imposed upon the board of supervisors appointed by the county court. Indeed, the language of section 2, article 7, imports jurisdiction of the county court to correct assessment in every case where it appears a person was improperly charged, not simply in

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Louisville Water Company v. Clark, Sheriff.

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respect to valuation, but with any tax or county levy for which he was not legally bound. The authority or jurisdiction of the county court being, to that extent and for that purpose, conferred, it naturally follows that his judgment or order in this case was not a ministerial, but a judicial act; and, being so, that judgment or order was, until reversed or vacated, conclusive as to legality of assessment of the company's property, and, therefore, as to authority of the sheriff to collect of it taxes for the four years named.

As heretofore held by this court, those duties of a public officer are ministerial in the performance of which he is vested with no discretion, even though such performance requires exercise of discretion. But where such officer may exercise both discretion and judgment as to how a duty is to be performed, the performance of the duty is judicial, though being at the same time ministerial. See *Cassidy, Auditor's Agent, v. Young, County Judge*, 92 Ky., 227, where the distinction between an act that is merely ministerial, in regard to the manner of performing which the officer may be subject to writ of mandamus, and an act that is judicial and consequently final and conclusive, until reversed or vacated in some mode provided by law. The decisions of this court on the subject are in that case all cited, and the application of the rule by which the distinction is to be determined, as heretofore made in various cases by this court, is shown.

In that case the question before the county court was, whether estate of a certain person deceased should be listed and assessed by the court, there having been

## Higgins v. Commonwealth.

up to that time a failure and refusal of the person to list the property. There, though the motion was by the Auditor's agent for the property to be assessed, the duty to be performed by the county court was no more judicial than was the duty performed by the county court in this case; for in both alike the question decided was whether the property was legally assessable. And, consequently, if the act in that case could be, as was held to be, judicial as well as ministerial, it is bound to be so held in this case.

It is, however, contended that the order or judgment of the county court was void, because rendered during pendency of an action in the chancery court, before mentioned, to recover the taxes by suit. But it is a sufficient answer to that proposition that the chancery court, as decided by this court, had no jurisdiction of the subject of that action.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

## CASE 9—INDICTMENT—FEBRUARY 11.

## Higgins v. Commonwealth.

## APPEAL FROM PULASKI CIRCUIT COURT.

1. AN INDICTMENT FOR A FELONY CREATED BY STATUTE need not allege that the acts complained of were done "feloniously," unless the statute requires that the acts should be done "feloniously" in order to constitute the offense.
2. THE OFFENSE OF UNLAWFULLY DETAINING A WOMAN AGAINST HER WILL, with intent to have carnal knowledge with her, may be committed against an insane woman.

94	54
100	561

94	54
111	97

94	54
124	651

94	54
126	631

94	54
129	486

94	54
133	706

## Higgins v. Commonwealth.

In this case the court properly instructed the jury that any act done by defendant toward the alleged victim (an insane woman) other than acts of kindness, courtesy and friendship, were done "against her will."

3. **SAME—EVIDENCE.**—As the room in which it was claimed the alleged detention occurred was exposed and used at all hours of the day and night, testimony as to its condition on the day following the trouble in question was not competent.
4. **UPON AN APPLICATION FOR A CHANGE OF VENUE** in a criminal case, the filing by the defendant of the required petition and affidavits makes for him a *prima facie* case, and if no witnesses are introduced by either party he is entitled to a removal of the cause. The court has then no discretion.

## W. A. MORROW, J. W. COLYAR FOR APPELLANT.

1. The court erred in refusing a continuance, the testimony of the absent witnesses being material.
2. The petition for a change of venue, with the accompanying affidavits, made for the defendant a *prima facie* case, and the court, in the absence of proof, erred in refusing to grant the application.
3. To constitute the offense charged in this case, it must be alleged and proved that the taking or detention of the woman was against her will. It is not sufficient that the attempt to have carnal knowledge of her was against her will. (*Wilder v. Commonwealth*, 81 Ky., 591; *Krambeil v. Commonwealth*, 8 Ky. Law Rep., 606.)

In the instructions given by the court in this case, the intent to have carnal knowledge is made the central point in the case.

4. The statute was not intended to apply to the detention of a lunatic or an idiot.
5. To constitute a good indictment for a felony, the word "feloniously" must be used, whether the offense is a statutory or a common law offense. (*Wharton on Criminal Law*, vol. 1, sec. 399; *Chitty on Criminal Law*, sec. 242; *Blackstone's Comm.*, 4th Book, p. 306; *Jane v. State*, 3 Mo., 61; *State v. Murdock*, 9 Mo., 739; *State v. Williams*, 30 Mo., 364; *State v. Deffenbacher*, 51 Mo., 26; *Bowler v. State*, 41 Miss., 570; *Mott v. State*, 29 Ark., 148; *People v. Olivera*, 7 Cal., 408; *Kaelin v. Commonwealth*, 8 Ky. Law Rep., 298.)

## W. J. HENDRICK FOR APPELLEE.

1. The word "felonious" is necessary to be charged only in an indictment for a *common law* offense where that ingredient enters. (*Kaelin v. Commonwealth*, 8 Ky. Law Rep., 298; *Evans v. Commonwealth*, 79 Ky., 415.)
2. The question as to change of venue rested in the sound discretion of the trial judge. (*Gen. Stats.*, chap. 12, art. 4, sec. 2.)



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Higgins v. Commonwealth.

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8. The second instruction to which exception is taken follows the common law rule that an insane person can not give consent. (2 Bishop on Crim. Law, secs. 1121, 1128; 1 Bishop on Crim. Law, sec. 261; *Rex v. Ryan*, 2 Cox C. C., 115; *State v. Crow*, 10 West, L. J., 501.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant was tried, convicted and sentenced to the penitentiary for the term of two years, upon an indictment under section 9, article 4, chapter 29, of the General Statutes, which provides that "whoever shall unlawfully take or detain any woman against her will, with intent \* \* \* to have carnal knowledge with her, \* \* shall be confined in the penitentiary not less than two nor more than seven years."

On this appeal he urges as ground for reversal, first, the omission of the word "feloniously" in the indictment.

To this it is sufficient to say that the acts mentioned in the statute quoted, when unlawfully done, constitute the whole of the crime denounced therein.

It need not be charged of the accused that he acted maliciously, willfully or feloniously; if he be charged in the language of the statute creating the crime and in the manner required by it, then the charge is complete, and includes all that is required to be established in order to constitute the guilt of the accused. In common law felonies the rule is different. (See *Kaelin v. Commonwealth*, 84 Ky., 354; *Cundiff v. Commonwealth*, 86 Ky., 196.)

Secondly, the appellant's counsel contend that the statute has no application in this case, because of the insanity of the victim alleged to have been unlawfully detained; that the crime must be committed against

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Higgins- v. Commonwealth.

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a woman having a will, capable of exercising it, and "against her will." But the authority relied on happily stops far short of supporting such an inhuman and unreasonable doctrine. The generous principle of the law governing the case was aptly illustrated in the instruction of the lower court, whereby the jury was told that any act done toward the alleged victim by the defendant, other than acts of kindness, courtesy or friendship, were done "against her will."

But the appellant, after due notice, filed his petition for a change of venue, alleging that on account of the prejudice against him and the excited state of public opinion he could not have a fair and impartial trial in Pulaski county. He supported his petition with the affidavits of two credible witnesses, all in strict accordance with the requirements of section 2, article 4, chapter 12, of the General Statutes. No other testimony was introduced or offered by either party. The court overruled the motion, dismissed his petition and application for removal, and of this he complains.

For the Commonwealth it is insisted that since the statutory amendment of April 1, 1880, the question of removal is one of discretion with the court, whereas, theretofore it was absolutely incumbent on it to order the change whenever the defendant complied with the requirements of the statute. The amendment reads: "And the court shall, on said motion, hear all witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to change of venue."

It is evident that the object of this amendment was

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Higgins v. Commonwealth.

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to give the State an opportunity of combating the *prima facie* case presented by the petition of the defendant and the affidavits of his friends. If this opportunity is not embraced, the court has no discretion. While the question was not directly presented, Judge Holt, in delivering the opinion of the court in *Wilkerson v. Commonwealth*, 88 Ky., 25, says: "Undoubtedly, if an accused, under the law as amended, presents his petition, accompanied by the two or more affidavits, and no witnesses are introduced in court by either party, the change of venue should be granted."

We think that the appellant was clearly entitled, on the state of case presented, to have his petition for removal granted.

While the same proof may not be offered in the case on its return, it is proper to say that the testimony of Trimble as to the condition of the room on the day following the trouble in question was improper. This room was exposed and used at all hours of the day and night, and its "torn up" condition twenty-four hours after the occurrence proves nothing, but, in view of Clark's testimony, might be misleading and prejudicial.

We perceive no error in the instructions of the court, and think they embrace the law of the case.

For the reasons indicated the judgment below is reversed, and cause remanded with directions to grant the appellant a new trial, and for proceedings consistent with this opinion.

Bohannon, &amp;c., v. Travis, &amp;c.

## CASE 10—PETITION EQUITY—FEBRUARY 16.

## Bohannon, &amp;c., v. Travis, &amp;c.

94	59
97	65
94	59
114	876

## APPEAL FROM M'LEAN CIRCUIT COURT.

1. **DEED FROM WIFE TO HUSBAND.**—A wife can not by deed, direct to her husband, divest herself of title to real property.
2. **CONTRACTS BETWEEN HUSBAND AND WIFE.**—Although contracts between husband and wife are at law void, they are not always so in equity. But a contract between husband and wife will not be enforced in equity in favor of either, unless it is fair and just, founded on a valuable consideration, and reasonably certain as to its stipulations, and the circumstances under which it was made.

A wife executed to her husband, in 1874, a deed to forty-seven acres of a one hundred-acre tract of land, upon which they then resided and continued to reside until the wife's death in 1888. After her death the husband conveyed to appellees the forty-seven acres which the wife attempted to convey to him, and in this action by the heirs of the wife against appellees to recover the land, the defense is that the husband in fact purchased the one hundred-acre tract of land in 1860, the date of the conveyance to the wife, and that under an agreement between them it was conveyed to the wife only for the purpose of securing to her the repayment of a part of the purchase money which she advanced, and that thereafter and until the wife's death the forty-seven acres was treated by both as the husband's land, the wife executing to him a title bond therefor in 1870. *Held*—That as the essential conditions of valuable consideration and of reasonable certainty as to the character and terms of the alleged parol contract are lacking, it would be neither just nor fair for a court of equity to enforce it, especially in view of the long period that has elapsed since it is alleged to have been made, and delay until after death of the wife of any claim to relief.

3. **LIMITATION.**—The plea of limitation will not avail, as the wife was never out of possession of the one hundred acres for a day.
4. **ESTOPPEL.**—The void deed can not be treated as an estoppel.

JEP C. JONSON, W. A. TAYLOR FOR APPELLANTS.

1. The conveyance from Mrs. Moore to her husband did not pass her title. (Gen. Stats., chap. 24, secs. 19, 20; *Idem*, chap. 52, art. 2, sec. 3; Newby v. Cox, 81 Ky., 59; Moore v. Tibbatts, 5 B. M., 355; Robinson v. Henning, 9 Ky. Law Rep., 141; Kennedy v. Ten Broeck, 11 Bush, 251; Scarborough v. Watkins, 9 B. M., 545; Chaney v. Flynn, 2 Ky. Law Rep., 417; Craine, &c., v. Edwards, &c., 13 Ky. Law Rep., 499.)

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Bohannon, &c., v. Travis, &c.

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2. The holding of the husband was not adverse. (1 Washburn on Real Property, 340, 341; 1 Roper on Husband and Wife, 3.)
3. The appellants are not estopped. (8 Washb. on Real Property, p. 77.)
4. The executory contract by which Mrs. Moore attempted to bind herself to convey one-half the one hundred acres to her husband was void.

**WM. B. NOE FOR APPELLEES.**

1. The husband being the equitable owner of the land, it was not necessary for him to unite with the wife in the conveyance made to him in 1874. By accepting the deed, his consent is implied. (Harris' Contracts of Married Women, sec. 585.)
2. Before appellants can recover they must restore to appellees the money, with its interest, paid by Jacob Moore to his wife. (Odell v. Little, 82 Ky., 146; Hawkins v. Brown, 80 Ky., 186; McDaniel v. Landrum, 87 Ky., 404; Heck v. Fisher, 78 Ky., 643; Craddock v. Tyler, 8 Bush, 360; Martin v. Martin, 5 Bush, 56.)
3. Contracts between husband and wife are upheld in equity, although void at law. (Ward v. Crotty, 4 Met., 60; Campbell v. Galbreath, 12 Bush, 460; Story's Eq. Jur., 1372; Hendricks v. Isaacs, 15 Am. St. Rep., 524; Schouler's Dom. Relations, 4th ed., p. 279.)
4. A deed made directly by the wife to the husband vests the equitable title in him, though such deed is void at law. (Turner v. Shaw, 96 Mo., 22; s. c., 9 Am. St. Rep., 319, and note, pp. 323-326.)
5. The contract of a married woman for the benefit of herself or her estate is binding in equity, and the estate affected by it need not be her separate estate. (Haussman v. Burnham, 21 Am. St. Rep., 78; Donovan's Appeal, 41 Conn., 551; Hitchcock v. Riley, 41 Conn., 611)
6. Although a deed of partition be invalid as a conveyance by reason of its non-execution, it may become effectual by the parties holding in pursuance of its terms, and dealing with their respective parts as if owned in severalty. Such acts work an estoppel. (Viner's Abridgment, title Partition.)
7. Appellants are estopped to recover as heirs of Mrs. Moore because of her contracts, deed and repeated declarations that she had no claim to the land.
8. A recovery by appellants is barred by the statute of limitations. (Gen. Stats., chap. 71, sec. 4; Mantel v. Beal, 82 Ky., 126; Conner v. Downer, 4 Bush, 132; Medlock v. Suter, 80 Ky., 101.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

In 1858 Jacob Moore, bachelor, married Adel Green, widow, having one child, though there was no issue of their marriage. And in 1860 D. M. White conveyed

to her a tract of about one hundred acres of land, which they occupied until her death in 1888. But in 1889 Jacob Moore attempted to convey and pass to C. B. and Sallie Travis absolute title to forty-seven acres, supposed to be half the tract.

This action was brought in 1891 by A. K. Bohannon and two other grand-children, only heirs at law of Adel Moore, to recover of C. B. and Sallie Travis the parcel of forty-seven acres which they hold possession of and claim under the deed from Jacob Moore, who was also made party defendant, though has since died. As defense, it is stated in the answer that Jacob Moore in fact purchased the one hundred acres from White at the price of six hundred dollars, of which three hundred and fifteen dollars was at the time advanced and paid by Adel Moore, but at her request, and under agreement between them, the deed was made to her for the only purpose of securing repayment of the money she so advanced. That thereafter and until her death the forty-seven acres was treated and recognized by both, and used by him as his own land. It is further stated and shown, by written instruments filed as exhibits, that March 12, 1870, Adel Moore executed a bond by which she covenanted to convey, by April 1st, to Jacob Moore, half the one hundred acres; and in 1874 she did attempt to convey directly to him, by deed, executed and acknowledged, forty-seven acres, identified and described as was subsequently done in his deed of 1889 to Travis.

The effect of the deed from White was to invest Adel Moore with legal title to the one hundred acres, and being her general estate she could not convey it

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in any other manner than directed in section 20, chapter 24, General Statutes, as follows: "The conveyance may be by the joint deed of husband and wife, or by separate instrument; but in the latter case the husband must first convey, or have theretofore conveyed. The deed as to the husband may be acknowledged and proved and recorded as heretofore provided."

It is manifest the deed in question was not executed in the manner required by statute; for he being the grantee, it was not nor could be a joint conveyance of husband and wife, nor did or could he, by separate instrument, convey. And as a wife can not, independent of the statute, by deed direct to her husband, divest herself of legal title in real property, nor invest him therewith, it results the deed mentioned was not effectual for that purpose, and the title bond was likewise unenforceable.

But although contracts between husband and wife are at law void, they are not always so in equity. In Story's Equity Jur., section 1372, it is said that notwithstanding there is deemed at common law positive incapacity of husband and wife to contract with each other, courts of equity will, under particular circumstances, give full effect and validity to post-nuptial contracts. And the general doctrine that for many purposes equity treats husband and wife as distinct persons, capable of entering into contracts with each other that will sometimes be enforced even against creditors of the husband, has been frequently recognized and applied by this court; though we think in every case, so far, it has been done at suit and for benefit of the wife. But in *Maraman v. Mar-*

aman, 4 Met., 84, where the doctrine was somewhat elaborately considered and numerous cases cited, in which it had been and ought to be applied, the case of *Livingston v. Livingston*, 2 Johns. Ch., 537, was referred to with approval, where a parol agreement between husband and wife that he should purchase and improve a lot for her, and be repaid by sale of another lot belonging to her, having been partially executed by him, was, at his suit, specifically enforced against her.

In the case of *Moore v. Freeman*, Bunb., 205, referred to by Story as an illustration of the doctrine, a wife having a separate estate entered into a contract with her husband to make him a certain allowance out of the income of such estate, for a reasonable consideration, the contract, though void at law, was held obligatory and enforceable in equity. In *Hendricks v. Isaacs*, 117 N. Y., 411, the husband having advanced to their daughter a certain amount upon a written agreement by the wife to repay him out of rents and income of an estate devised by his father for support of her and the children, it was held in an action by him against her administrator the contract was reasonable and just, and his claim for reimbursement was sustained.

The case of *Haussman v. Burnham*, 59 Conn., 117, is very much like this. There the husband being in feeble health and intending to make provision for his wife after his death, conveyed land to an attorney, who, on the same day, conveyed it to her. The consideration for the deeds was a promise by her to reconvey to him when requested. She did subsequently



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attempt to do so by a deed executed by her alone, her husband not joining. After her death, in a controversy about the land between her children by a former husband and her surviving husband first, and then, he having died, his heirs at law, it was held by the court that the promise of the wife was based upon a valuable consideration enforceable in equity; that although the deed she executed was void, the court would look through the deed to the contract back of it and enforce that.

But a contract between husband and wife will not be enforced in equity in favor of either, unless it is fair and just, founded on a valuable consideration, and reasonably certain as to its stipulations and the circumstances under which it was made.

It is not, in terms, stated in the answer that Adel Moore promised to convey the tract of one hundred acres, or any part of it, to Jacob Moore, upon repayment to her of the money advanced, though we will assume it to have been substantially alleged; nor is the allegation in the answer in respect to character and terms of the contract consistent with the claim now set up, or with the deed she attempted to execute; for while it is stated in the answer of Jacob Moore that the land was purchased by him, and deed therefor made to Adel Moore for the sole purpose of securing to her repayment of money advanced by her, he did not thereafter claim nor attempt to convey Travis more than what he supposed to be half the tract. Moreover, while it is stated in the answer she paid only three hundred and fifteen dollars of the purchase price, of which, as alleged, he subsequently

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repaid to her two hundred dollars, in the title bond of 1870 the consideration for her covenant to convey to him half the land is four hundred dollars, receipt of which is there acknowledged. Nor do either the stipulations of the bond or allegations of the answer at all harmonize with recitals or stipulations in the deed of 1874; for in the latter instrument it is recited that Adel Moore had paid of the original purchase price of the land six hundred dollars, and Jacob Moore only two hundred dollars; and instead of an acknowledgment of full payment of consideration of the forty-seven acres, as was recited in the title bond, it is expressly stipulated in the deed that in consideration of conveyance of half the land to him she should take at his death, in addition to her distributive share under the statute, personal property of his estate of the value of at least six hundred dollars. The legal title remained in Adel Moore up to her death, a period of twenty-eight years, and she held it after 1874 fourteen years without any demand by him or attempt by her to divest herself of it; and though there is some evidence tending to show he claimed exclusively forty-seven acres as his own, it does not satisfactorily appear he ever did pay to her any part of the original purchase price she advanced; on the contrary, if the deed of 1874 is to be treated as evidence for any purpose, it shows he had not then paid any part, but owed her six hundred dollars—original price of the land. It does, however, appear he paid taxes for which the land was annually assessed, but it is not shown the amount thereof was agreed to be accepted in payment of his part of purchase price of the land; nor, inas-

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much as he had use and enjoyment of the land, can such payment be now taken into account.

The court is thus called on to enforce a parol contract between husband and wife concerning her real estate twenty-eight years after it is alleged to have been made, the character and terms of which are not, with any degree of certainty, shown, and which the evidence conduces to show has never been fully, if at all, performed on his part; and such relief, if afforded, will inure to benefit not of *bona fide* purchasers, but of persons claiming under a voluntary deed made by the husband after death of his wife.

The statute of limitation pleaded and relied upon in bar of the claim of her heirs at law manifestly can not avail the defendants, vendees of the husband; for it is not pretended the wife ever was out of actual possession of the one hundred acres a day. Equally unavailing is the plea of estoppel; for the void deed can not be treated as such. The essential conditions of a valuable consideration, paid or performed for the alleged parol contract, and of reasonable certainty as to its character and terms, are lacking. It would, therefore, be neither just or fair for a court of equity to enforce it, especially in view of the long period that has elapsed since it is alleged to have been made, and delay until after her death of any claim to relief.

Wherefore the judgment of the lower court is reversed, and cause remanded for proceedings consistent with this opinion.

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**Louisville & Nashville R. R. Co. v. Bonhayo. Same v. Holzhauer.**

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**CASE 11—PETITIONS ORDINARY—FEBRUARY 16.**

94	67
94	71

**Louisville & Nashville R. Co. v. Bonhayo.**

**Same v. Holzhauer.**

**APPEALS FROM CAMPBELL CIRCUIT COURT.**

1. **INJURY TO NEIGHBOR BY DIGGING ON ONE'S OWN LAND.**—Where a land-owner, by digging on his own land, has deprived the land of his neighbor of its natural support, he is, whether negligent or not, liable in damages to his neighbor, not only for the actual injury to the soil, but for injuries to buildings. But where the buildings erected by the neighbor on his land have, by their downward pressure, caused the natural support to give way, he can not recover, either for injury to his lands or the buildings upon it.
2. **NEGLECT IN BLASTING.**—Although a land-owner may not have removed the natural support of his neighbor's soil, yet, if by negligence in blasting he has caused injury to either his neighbor's land or buildings, he is liable in damages.

**JAMES C. WRIGHT FOR APPELLANT.**

**C. L. BAISON, JR., FOR APPELLEE.**

Briefs not in record.

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

The dwelling and premises of the appellee, John Bonhayo, plaintiff below, were located on or near the railway of the appellant, and the latter, in widening its road, dug and excavated the ground so as to cause the soil to slide and take from his land its natural support, thereby causing the foundation of his dwelling to give way or move from its natural position, &c.

The plaintiff, as appears from the testimony, erected his dwelling after the road was constructed, and it is pleaded as a matter of defense that the increased weight of plaintiff's dwelling, and other acts of his

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in digging trenches and excavating a cellar, brought about the injury complained of. The building is erected on a hillside that slopes towards the railroad, and if the digging and blasting by the company took from the soil its natural support, resulting by reason of the act of the defendant in this injury to his property, the defendant is liable in damages for the injury sustained. This right of lateral support is an incident to the land, and one adjoining or near to has no right to so excavate and dig the soil as to deprive the land of his neighbor of this support. If the building erected by the plaintiff has caused this soil to slide, or the pressure on the soil by the building is such that prevented the railway company from widening its road when exercising ordinary prudence in its work, the injury to the building can not enter into the question of damages, for the reason, as said in the case of *Farrand v. Marshall*, 19 Barb., 380, "that he who complains of the use which another makes of his own property must himself be free from fault." It follows, therefore, that for an injury to the adjoining land by reason of an act by the defendant that deprives the land of its natural support damages may be recovered without showing negligence, on the idea that the right of property has been invaded; but where the plaintiff has erected buildings that, by their pressure, cause this natural support to give way, when the act of the defendant is only such as the owner would have the right to exercise on his own soil, no recovery can be had for either an injury to the land or the buildings upon it. (*Foley v. Wyeth*, 2 Allen, 131.)

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Louisville & Nashville R. R. Co. v. Bonhayo. Same v. Holzhauer.

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Suppose, however, the defendant, by neglect in excavating his own soil, not only removes the natural support, but also injures the buildings of his neighbor, in such a case it is plain that damages may be recovered, not only for the actual injury to the soil, but for the damage done the buildings also. In this case it is apparent from the testimony that the parties in interest were complaining of the manner in which the digging and blasting was being conducted, and entertaining fears that it would result in causing the soil to slide, were told that the defendant would see that their land was protected. It is shown that one blast of powder and dynamite threw railroad ties in every direction, broke down out-houses and fencing, and in a day or two the ground began to crack or give way from John street, on which appellee's property is located, to York street, the crack widening until the opening was five or six inches, and one of the defendant's own witnesses states that it was this excavation that caused the soil to slide.

There is also testimony conducing to show that the house and premises of the plaintiff were in good condition before that wrong was committed, and there is but little doubt that the injury resulted from the acts of the defendant; although there is testimony tending to show that a landslide had occurred at or near this spot many years ago; and also that the digging of trenches and cellars on the premises contributed to the injury. These were questions for the jury, and the verdict must stand, unless there was some error in the instructions given. There were two instructions given, embracing the question of title and

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possession. The deeds exhibited included appellee's land. He had purchased and was in the possession, and his right to maintain the action cannot be questioned. The first instruction told the jury that the land of the plaintiff was entitled to this natural support, and if deprived of it by the act of the defendant, the latter is liable, unless the plaintiff, or some one of the adjoining owners on the same hillside, had weakened or loosened the earth by digging, ditching or excavating for cellars, or by buildings had increased the down pressure, &c., and but for which the injury would not have happened, and in that event they must find for the defendant.

The jury was further told that if the lateral support of plaintiff's soil was not removed by defendant as stated, but that the plaintiff's property was injured by the careless and negligent manner in which the blasting was conducted, and that this caused the injury, they must find for the plaintiff. The jury was again told that if those engaged in the blasting and removal of the stone and soil were not the agents of the defendants or their employees, or if such, were not acting within the scope of their authority, they must find for the defendant. This instruction was given on the idea that Squires, who did the work, was an independent contractor, and the railroad company was not bound for his negligence.

Another instruction had been given on that branch of the case, and the verdict being for the plaintiff, no complaint can be made of this ruling, although we think the proof shows that the parties doing this work were mere subordinates, and acting under the

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advice, control and management of the company in its execution, and within the scope of their authority. The instructions are lengthy, and may contain some abstract propositions, but the substance of them is given, and, we think, the verdict in the case was authorized by the testimony, and, in fact, the preponderance of the testimony is with the plaintiff. Judgment affirmed.

The opinion in this case applies also to the case of Louisville and Nashville R. Co. v. Gustavus Holzhauser. The question as to whether the natural support of the plaintiff's land was removed by the appellant, and causing the injury complained of, was properly submitted to the jury, and the evidence authorized the verdict.

Judgment affirmed.

94	71
94	175

CASE 12—PETITION ORDINARY—FEBRUARY 16.

Cincinnati, &c., R. Co. v. Barker, &c.

APPEAL FROM PULASKI CIRCUIT COURT.

1. RAILROADS—DESTRUCTION OF BUILDINGS FIRED BY ESCAPING SPARKS.—A land-owner's erection and use of a building for ordinary purposes near a railroad track, although it is more exposed to fire than if it were at a greater distance, is not negligence and will not deprive him of a right of action against the railroad company for the loss of the building by fire, resulting from sparks escaping from a locomotive through the company's negligence.
2. SAME.—A railroad company is liable for the destruction of a storehouse by fire which spread from its depot, which was ignited by sparks escaping from a locomotive through its negligence. The injury is sufficiently proximate.
3. SAME—PLEADING.—In this action to recover for such a loss, the de-



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nial of the answer that the defendant "negligently and carelessly set fire to its depot," is in effect an admission that defendant did set fire to its depot, and is a denial merely that it was "negligently" done.

4. **SAME—EVIDENCE.**—Although the court struck from plaintiff's petition all allegations as to defendant's negligence growing out of the combustible character of the material in the depot, and defendant's knowledge of the fact, still it was competent for plaintiff to prove the facts thus stricken from his pleading, as the question as to whether defendant was negligent in the operation of its locomotive, depended, to some extent, upon the character of the surrounding buildings; and, besides, the combustibility of the depot was a circumstance bearing on the question as to whether the depot was actually fired by the sparks.
5. **SAME—INSTRUCTIONS TO JURY.**—The jury could not have been misled by an instruction authorizing them to find for plaintiff if they believed the fire was the result of the negligence of defendant in the construction or management of its engine, "or in the construction of its depot." The depot was admittedly fired by sparks which escaped in such quantities as to indicate a disarrangement of the spark arrester, and in whatever way the depot might have been constructed the verdict could not reasonably have been any thing else under the pleadings.

**C. B. SIMRALL FOR APPELLANT.**

1. No liability for fire where railroad company uses best and most effective preventive to prevent escape of sparks. (Wharton on Negligence, sec. 869; Pierce on Railroads, p. 488; Thompson on Negligence, vol. 1, p. 154; Kentucky Central R. Co. v. Barrow, 89 Ky., 638; L. & N. R. Co. v. Taylor, 92 Ky., 55.)
2. Plaintiff has burden of proving fire originated from defendant's engine. Not sufficient to show *possibility* that injury was caused by the defendant. (Pierce on Railroads, p. 436, and cases cited; *Ibid*, p. 487; Wharton on Negligence, sec. 870, and cases cited.)
3. Not sufficient to show two causes, for only one of which defendant is liable. (Priest v. Nichols, 116 Mass., 401; Colton v. Wood, 8 Common Bench (N. S.), 568; Thompson on Trials, sec. 1675; Dublin, &c., R. Co. v. Slattery, 3 Appeal Cases, 1155; Metropolitan R. Co. v. Jackson, L. R., 3 Appeal Cases, 197; T. W. & W. R. Co. v. Brannagan, 76 Ind., 490; I. B. & W. R. Co. v. Greene, 106 Ind., 279; Warner v. N. Y. C. R. Co., 44 N. Y., 465; Condell v. N. Y. C. R. Co., 75 N. Y., 380; State v. Maine Central R. Co., 76 Me., 357; Lesan v. Maine Central R. Co., 77 Me., 85; Baulec v. N. Y. & H. R. Co., 59 N. Y., 357; Forty-second St. & G. F. R. Co. v. Hayes, 97 N. Y., 259; Phil. & R. R. Co., v. Shertle, 2 A. & E. Ry. Cases, 158; Com. v. Cozine, 10 Ky. L. R., 412.)

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4. Duty of court when requested to instruct jury on every point pertinent to the issue. (Reading v. Metcalf, Hardin, 535; Bell v. North, 4 Littell, 188; Owings v. Trotter, 1 Bibb, 167; Lapish v. Wells, 6 Me., 175.)
5. A party has a right to insist on proper charge in terms in which it is asked. Refusal to give same is error. (Hinton v. Nelens, 18 Ala., 222; Hays v. Borden, 6 Ill., 46; Campbell v. Day, 16 Vt., 588.)
6. Instruction as to burden of proof was the approved one, and refusal to give same was error. (Sackett on Instructions to Juries, p. 254; De-Beneditti v. Mauchin, 1 Hilton, 213; Long v. Hall, 97 N. C., 286.)
7. Under the pleadings the only issue was, whether or not the depot was set on fire by sparks negligently thrown from defendant's engine, and it was error to permit evidence to go to the jury of the unsafe condition of the depot, or to instruct the jury on that point.

O. H. WADDLE, W. A. MORROW OF COUNSEL ON SAME SIDE.

W. O. BRADLEY FOR APPELLEES.

1. The defendant was liable for damages occasioned by the negligent construction of its depot, or by allowing any combustible matter to accumulate on its right of way. (Pierce on Railroads, p. 482; Salmon v. D., L. & W. Co., 20 Am. Rep., 359; Vaughn v. Taff Vale R'y Co., 5 Hurl. & Norm., 659; Flynn v. S. F. & S. J. R. Co., 6 Am. Rep., 597 and notes; Bass v. C. B. & S. Q. R. Co., 81 Am. Dec., 254; Post v. M. P. R. Co., 12 S. W. Rep., 1181; Gulf, &c., R'y Co. v. Benson, 5 Am. St. Rep., 74; D., L. & W. R. Co. v. Salmon, 23 Am. Rep., 219; Kellogg v. C. & N. R. Co., 7 Am. Rep., 69.)

And it was competent for plaintiff, under the general allegation of negligence, to prove the improper construction of the depot. (Chiles v. Drake 2 Met., 146; L. & N. R. Co. v. Wolfe, 80 Ky., 83.)

2. Plaintiff was entitled to judgment by default, the denials of the answer being in the conjunctive instead of the disjunctive, and otherwise not positive and certain. (Newman's Pleading and Practice, p. 514; Corbin v. Commonwealth, 2 Met., 381; Wood v. Whiting, 21 Barb., 190; Levy v. Bend, 1 E. D. Smith, 169; Preston v. Roberts, 12 Bush, 581; Taylor v. Farmer, 81 Ky., 463.)
3. When the plaintiff shows that his property caught on fire from the defendant's engine, the burden is on defendant to disprove negligence. (Bass v. C., B. & Q. R. Co. (28 Ill., 9), 81 Am. Dec., 254; Sheldon v. Hudson River R. Co., 67 Am. Dec., 155; Norton v. Giles, 90 (N. C.), 374; Deamond v. N. P. R'y (Montana), 18 Pac. Rep., 367; L. & N. R. Co. v. Reece (Ala.), 5 Sou. Rep., 283; M. P. R'y Co. v. T. & P. R'y Co., 41 Federal Rep., 917; Koontz v. Oregon R'y & Nav. Co. (Oregon), 23 Pac. Rep., 820; Burk v. L. & N. R. Co. 19 Am. Rep., 618 (7 Heisk. Tenn., 451); Bass v. C., B. & Q. Co. (28 Ill., 9), 81 Am. Dec., 254; Illinois Central R. Co. v. Mills, 42 Ill., 407; St. L., A.

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- & T. H. R. Co. v. Montgomery, 39 Ill., 335; Spaulding v. C. & N. W. Co. (30 Wis., 110), 11 Am. Rep., 350; Clemmon v. H. & St. J. R. Co. (58 Mo., 366), 14 Am. Rep., 462; Huyett v. P. & R. Co., 28 Penn. St., 378; Piggot v. E. C. R. Co., Man. Gr. & Scott, 229; s. c., 54 Eng. C. L., 229; Ellis v. P. R. Co., 2 Ire. (N. C.), 188; Hull v. Sacramento R. Co., 14 Cal., 387; A., T. & S. N. R. Co., v. Standford, 12 Kan., 354; Fitch v. Pacific R. Co., 45 Mo., 322; Bedford v. Hannibal & St. J. R., 46 Mo., 456; Coal v. Same, 60 Mo., 227; Clemens v. Same, 53 Mo., 366; Kenny v. Same, 70 Mo., 248; Coats v. M., K. & T. R. Co., 61 Mo., 38; B. & M. R. Co. v. Westorer, 4 Neb., 268; Woodson v. M. & S. P. R. Co., 21 Minn., 60; Case v. N. O. R. Co., 59 Barb., 644; Aldridge v. G. W. R. Co., 3 Man. & G., 515; Piggot v. Eastern Counties Railway, 3 Com. B., 229.)
4. It was competent to show the depot had been fired several times previous to April, 1886, by other engines. (Wharton's Evidence, vol 1, sec. 43, and authorities cited; Pierce on Railroads, p. 439; Wharton's Negligence, sec. 878; Sheldon v. Hudson River R. Co., 67 Am. Dec., 155; M. & P. R. Co. v. Donaldson (Texas), 11 S. W. Rep., 163; Koontz v. Oregon R'y & Nav. Co., 23 Pac. Rep., 820.)
  5. The evidence in this case is sufficient to show negligence in the equipment and management of the engine. (Pierce on Railroads, p. 439; Wharton's Negligence, sec. 876; Notes to sec. 2, vol. 8, Am. and Eng. Enc. of Law, title "Fires;" Fero v. B. & S. L. R. Co. (22 N. Y., 209), 78 Am. Dec., 128; Jackson v. C. & N. W. R'y Co. (31 Iowa, 176), 7 Am. Rep., 122; Burk v. L. & N. R. Co. (7 Heisk., 451), 19 Am. Rep., 619; Russell v. Manhattan R. Co., 13 Daly (N. Y.), 11; Ashby v. Manhattan R. Co., *Idem*, 205; Coolege v. Rome, W. & O. R. Co., 5 New York Supp., 301; Johnson v. C. & N. W. R. Co. (Iowa), 42 N. W. Rep., 512; M. P. R'y Co. v. T. P. R'y Co., 41 Fed. Rep., 917; Johnson v. C. & M. R'y Co., 31 Minn., 57; L. & N. R. Co. v. Taylor, 92 Ky., 55.)
  6. Contributory negligence can not be relied on unless pleaded. (K. O. R. Co. v. Thomas, 79 Ky., 164; Depp v. L. & N. R. Co., 12 Ky. Law Rep., 366.)

J. L. AND J. W. COLYER OF COUNSEL ON SAME SIDE.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The Barkers, as plaintiffs in the court below, brought suit against the defendant, now appellant, alleging that on the night of April 5, 1889, "the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and

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which extended to and consumed the storehouse of plaintiff aforesaid. That said negligence of the defendant was the natural, probable and proximate cause of the burning of their said house, and that by such negligent act of defendant, they have been damaged three thousand dollars."

They also made proper averments of ownership and possession of the burnt property, and its location and value.

At the appearance term of the case, October, 1890, they filed an amended petition, and "the defendant not being ready for trial on account of the filing of said pleading," was given a continuance.

The amendment charged that the defendant negligently erected and suffered and permitted its depot to remain near the track, although same—except the shed thereof—was covered with shingles and constantly exposed to fire and sparks emitted from its locomotive, and notwithstanding the fact it was fully aware of such danger, and had been time and again notified of such danger, and knew that fire had been communicated to its said depot and other buildings time and again from such sparks and fire, all of which plaintiffs charge was gross negligence, and that by reason of which negligence the depot was burned, and the fire directly communicated to their building consumed it, &c. Thereupon a demurrer was filed to this amended petition, and also a motion to strike out such parts of it as alleged that the defendant was aware of such danger—referring to the shingle roof and the constant exposure to fire and sparks from the locomotive—and had been notified of such

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danger, and knew that fire had been communicated to the depot and other buildings time and again from such sparks and fire.

At the April term, 1890, the court sustained the demurrer to the amended petition, making no order on the motion to strike out. The plaintiffs then filed their amended petition No. 2, alleging that the defendant carelessly and negligently set fire to its depot ("which depot was dangerously combustible") in said South Somerset, by reason of which, &c.

On defendant's motion and over the plaintiffs' objection, the words "which depot was dangerously combustible," were stricken out by the court, and a demurrer to the petition, as amended, was overruled.

The plaintiffs' cause of action, therefore, was this:

"That the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which extended to and consumed the store-house of plaintiffs. That the defendant carelessly and negligently set fire to its depot, by reason of which it was consumed, and the fire from which depot then and there communicated to and with the plaintiffs' building, and was the proximate, probable and natural result of the carelessness and negligence of the defendant as aforesaid."

The defendant then, by one pleading, answered both the original and amended petitions, saying that it was "not true that on the night of April 5, 1889, it negligently set fire to its depot in Somerset, Ky., by sparks and coals of fire thrown from its locomotive, or that it carelessly and negligently set fire to

said depot at the time mentioned, and referred to in the petition," or that "the destruction of the plaintiffs' property referred to and described in the petition was the proximate, probable and natural result of its negligence as alleged in the petition."

These were the pleadings on which the case proceeded to trial. Evidently the answer, so far as it attempted to traverse the allegations of the original petition, is, in strictness, not good for any purpose. It may mean that the company set fire to its depot by sparks and coals thrown from its locomotive, but not *negligently*; or it may mean that it negligently set fire to its depot, but not by sparks and coals thrown from its locomotive. The latter could hardly have been intended, and taking it at its best, it is an admission that it set fire to its depot by sparks and coals from its locomotive, but did not do so negligently. In so far as it sought to traverse the statements of the amended petition, the answer, when liberally construed, simply says it is not true that the company *negligently* and *carelessly* set fire to its depot, manifestly admitting as a *fact* that it did fire the depot. Construed strictly, considering the conjunction "and," it might mean to admit that the company in fact fired the depot carelessly, but not negligently, or negligently and not carelessly. But treating the words as synonymous, considered as a whole we think the answer must be taken to be a statement that the company in fact set fire to its depot by sparks and coals thrown from its locomotive, but did not do so negligently *or* carelessly.

The plaintiffs' proof was to the effect that on the

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night in question engine No. 58 was fired up, and left a point in Somerset, south of the depot a few hundred yards, pulling northwardly a number of loaded cars; that when it passed the depot it emitted sparks and coals in large quantities, which floated up, over and on the depot, and that shortly thereafter the shingle roof of the structure was seen to be on fire; the flames spread rapidly, and soon set fire to the house of plaintiffs, which was immediately across the street from the depot, a distance of forty-five feet; that the weather was warm, and there were no fires being kept in the depot building. Plaintiffs also introduced some proof conducing to show that the locomotive used was not supplied with the most improved fire screen and spark arrester; that it slipped badly when on the track in front of the depot, as if it were overloaded; that it worked hard, and threw sparks in unusually large quantities. Under the permission of the court and over the objection of the defendant the plaintiffs proved that the building was in part covered with shingles, and that there were spaces under the eaves of the building where birds had located their nests; and that on several former occasions, in warm weather, when there were no fires in the depot, the same roof had caught on fire just after a passing train, and that the defendant knew of this, and had in fact repaired the burnt roof.

The defendant's testimony showed that their engine and its screen and spark arrester were of the most improved patterns in use or known to science; that the train was not loaded unusually heavy; that coal, and not wood, was used in firing the engine; that no

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sparks were emitted; there was no slipping on the track or any derangement of the engine; moreover, that the fire was seen inside the depot burning more fiercely than on the outside, and may have caught from the inside; that the night was cool, and there was a fire in at least one of the rooms in the building. Its chief carpenter and superintendent of buildings fully explained the construction of the depot, which was covered partly with tin and partly with shingles, and there were no spaces under the eaves where birds could find lodgment for nests.

Upon this state of case the jury, after instruction, found for the plaintiffs the sum of two thousand eight hundred and seventy-five dollars.

It is insisted by counsel for the appellant that although the court had, by its action in sustaining the demurrer to the first amended petition, and in striking out the words "the depot was dangerously combustible" from the second amended petition, narrowed the issue to the negligent setting on fire of defendant's depot; yet the trial was allowed to proceed both as to the evidence and the instructions upon the theory that plaintiffs' cause of action, as set forth in their pleadings, included, or was founded on, negligence growing out of the combustible character of the material in the depot, and on the assumption that such fact was known to the defendant. And it must be conceded that unless this testimony with regard to the combustible nature of the depot legitimately and properly elucidates the issue as made by the pleadings, the defendant was prejudiced by its introduction.



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Why was it that the learned judge below, at defendant's instance, or on its motion, sustained the demurrer to the amended petition setting up the very facts which were admitted by the court as evidence on the trial, and why strike out the words respecting the dangerous combustible character of the depot in the second amendment, when proof was immediately admitted before the jury regarding the shingle roof and the open eaves and birds' nests of straw, &c.?

Manifestly, because the setting fire to the depot *negligently*, or the *negligence* in setting fire to the depot, by the sparks, depended on the character of the building alleged to have been set afire. *Negligence* is the leading thought.

The instrumentality or active agent of negligence was the locomotive throwing sparks, but upon what? On a tin roof or on a clean plowed field, or on a straw stack, or on a depot covered with straw, or on one covered with shingles and constructed with open eaves? Clearly the negligence in setting fire to a thing by a locomotive depends on the condition, not alone of the machine itself, but on the uses it is being put to—the location and the surroundings—and these are matters of evidence.

The combustibility of the depot was one of the circumstances bearing on the fact of whether the depot was actually fired by the sparks. Had the building been fully fire-proof, would not that fact have furnished evidence against its being set on fire by the sparks? We do not pretend to decide that the mere fact that the depot was covered with shingles, is of itself evidence of negligence. It is not ordinarily so.

But when situated so that, from some reason, it is frequently fired by passing trains, and coupled with the significant proof that the defendant was aware of the combustible material of which the roof was composed, and that it had before been fired by sparks, we are fully prepared to say that if defendant used a spark-throwing locomotive in proximity to such a roof and fired it, it would be "negligently setting fire to the depot by sparks thrown from its locomotive."

With the fact conceded that defendant fired the depot by sparks thrown from its engine, with the fact established that an unusual number of sparks were thrown on the night in question, indicating a disarrangement of the spark arrester, with the knowledge and information brought home to the defendant respecting the previous fires and the dangerous quality of the pine and poplar shingles on the roof of the depot in dry weather, we are of opinion that the instructions on the subject of the construction of the depot could not have been misleading to the jury.

The first instruction reads as follows:

If you believe, from the evidence, that the depot of the defendant, at Somerset, on the night of April 5, 1889, was burned by reason of the negligence of defendant in the construction of its engine, or in the construction of its depot, or in the management of its engines, and the burning of plaintiffs' house was the natural and probable consequence, you will find for the plaintiff, and unless you so believe you will find for the defendant.

The only chance for misapprehension here, on the

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part of the jury, was in considering the meaning of "negligence in the construction of its depot," and this was not considered abstractly. No one could know what the expression would mean, or was intended to mean, unless in connection with the proof, and when so considered and the proof in the case applied to the language, it is deprived of any ambiguous or misleading feature. And this, we think, is true of the second instruction, which embraces this same expression.

The depot was admittedly fired by sparks from the engine, and whether it had, in fact, a shingle roof or other kind, or open or closed eaves, and in whatever way it might have been constructed, the verdict could not reasonably have been any thing else under the pleadings.

Instruction "A," asked by defendant, precluded plaintiffs' recovery if they built their house prior to the building of the depot, and knew of its exposure to fire, &c., and is not the law. "A land-owner's erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence." (Pierce on Railroads, p. 435.)

Instructions "B" and "F" were in effect given by the court. "C" and "E," on the question of burden of proof, were wholly inapplicable, and instruction "D" offered on the "care" necessary to be used, was substantially given in the one defining negligence.

Nor is there any doubt as to the injury being sufficiently proximate.

"The ignition for which the company is liable need

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not take place from the very particles of fire thrown out by its engines." If the fire spreads from the matter first ignited, the intervention of considerable space, diversity of ownership, or various physical objects, &c., does not preclude recovery by the party injured, or affect the company's liability for its first negligent act. (Pierce on Railroads, 441.)

Upon the whole case we think there has been no error prejudicial to the substantial rights of the appellant. The judgment is therefore affirmed.

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 CASE 13—PETITION EQUITY—FEBRUARY 23.

## Louisville Banking Company v. Eisenman, &amp;c.

## APPEAL FROM LOUISVILLE CHANCERY COURT.

## 1. CORPORATIONS—PURCHASE BY ONE STOCKHOLDER OF ALL THE STOCK.

—While one person can not organize a corporation under chapter 56 of the General Statutes, yet when a corporation has been created under that statute, with the stock distributed among several stockholders, the purchase by one of them in good faith of all the stock does not destroy the existence of the corporation, but merely suspends its franchise until the stock may be transferred to others; and while, in the meantime, the corporate property is liable for the individual debts of the sole owner, and subsequent purchasers of stock take it subject to the liens or equities of his creditors created prior to the transfer of the stock to them, yet the individual property of the sole owner is not liable for debts created by him on behalf of and in the name of the corporation. The parties contracting with him as a corporation get all they bargained for when they subject the corporate property to the payment of their debts.

## 2. SAME.—In corporations other than such as are created under chapter 56 of the General Statutes the purchase by one stockholder of all the stock does not dissolve the corporation.

## 3. FAILURE OF STOCKHOLDERS TO PAY IN STOCK REQUIRED BEFORE BEGINNING BUSINESS.—In the absence of a fraudulent purpose, the

94	83
95	607

94	83
105	159
105	160
105	161

94	83
113	718

94	83
116	782
94	83
116	782

94	83
1123	161

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failure of the stockholders in a corporation created under the statute to pay in all the stock required to be paid in before beginning business does not render them liable under that provision of the statute giving a right of action against the members of the corporation in favor of any person who has been injured through their "intentional fraud" in failing to comply substantially with the articles of incorporation.

4. **SAME.**—The claim of the corporation against a stockholder for stock subscribed and not paid in forms a part of the assets of the corporation, and may be subjected by its creditors.

**BARNETT, MILLER & BARNETT, BRIGHT & BRANDEIS for APPELLANT.**

1. The appellee Eisenman was guilty of intentional fraud, (a) in that he failed and refused to comply with the charter of the corporation in owning all the stock and being the sole director and officer of the corporation. (First Blackstone, 470; Overseers v. Sears, 27 Pick., 125; First Lawson on Rights and Remedies, 598; Thomas v. Daking, 27 Wendell, 9; Brunswick v. Dunning, 7 Mass., 447); (b) in that he applied the money of the corporation to the payment of his own debts. (Gratz v. Redd, 4 B. Mon.; Railroad Company v. Bridges, 7 B. Mon.; Shakers v. Underwood, 9 Bush, 621; Myer, &c., v. DuPont, 79 Ky., 422); (c) in that he knowingly exceeded the limit of indebtedness of the corporation. (Brannin v. Loving, 82 Ky., 370; Stafford v. Cain (decided by the Superior Court January 27, 1892).
2. Appellee, being the president, sole director and only member of the corporation, must be presumed to have been familiar with the condition of his corporation and with the provisions of its charter (Brannin v. Loving, 82 Ky., 375); and in doing the acts complained of, he must have intended that the natural and ordinary results would follow. (11 American and English Encyclopedia of Law, 377; Van Etten v. Eaton, 19 Mich., 22; 22 Central Law Journal, 271 (March 19, 1886); Blake v. Griswold, 108 New York, 429.)
3. The public have a right to assume that the president of a company is familiar with its condition, and are not required to know more than the provisions of its charter. (Morawetz on Corporations, sec. 64; Brannin v. Loving, *supra*; Stafford v. Cain, *supra*.)
4. The right of action given by section 9 of chapter 56 of the General Statutes is in the creditor who has been injured by the acts therein denounced, and does not belong to a corporation whose officer or agent has been guilty thereof, and *a fortiori* not to the assignee for the benefit of creditors of such corporation. (Sec. 9 of chap. 56, General Statutes; Cook on Stockholders, sec. 216; Bristol, Assignee, v. Sandford, 12 Blatch., 341; Dutcher, Assignee, v. Bank, 12 Blatch., 435; Jacobson, Receiver, v. Allen, 20 Blatch., 525; McCarthy v.

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Lavasche, 89 Ill., 270; Culvert v. Third National Bank, 64 Ill., 828; Hall v. Klink, 25 So. Car., 351; Flash v. Conn, 109 U. S., 371; Wiles v. Suydum, 64 N. Y., 178; Stafford v. Cain, *supra*.)

**BURWELL K. MARSHALL FOR APPELLEES.**

1. Actual, intentional fraud must be proved before appellant can hold appellees liable for the corporation's debts. (Gen. Stats., chap. 56, sec. 9; Sanford v. McArthur, 18 B. M., 420.)
2. The appellant having elected to sue the corporation, and thus recognized its corporate existence, can not now sue the defendant. (Cook on Stock, Stockholders and Corporation Law, section 243; Cresswell v. Oberly, 17 Bradwell, 281; Pochelu v. Kemper, 14 La. Ann., 308.)
3. Although a corporation is advertised as having a capital stock of a fixed amount, the share-holders and directors are not liable personally, even though subscriptions have not been taken to that amount. (First National Bank of Salem v. Almy & Co., 117 Mass., 476.)

Our own statute provides that corporations shall be presumed to be legally organized until the contrary is shown in regular proceedings brought for that purpose. (Gen. Stats., chap. 56, sec. 17.)

4. The defendant, if liable at all, is liable only to the extent of the difference between what was actually paid in and the total amount that should have been paid in, and not to cross-plaintiff alone, but to the assignee of the corporation for the benefit of all the creditors, share and share alike. (Lane's Appeal, 105 Pa. St., 49.)
5. Parol proof may be made of the acts of a corporation. (Cook on Stock, Stockholders and Corporation Law, notes to section 714.)

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

A corporation styled The Eisenman Bros. & Co. was organized under chapter 56 of the General Statutes for the purpose of engaging in the milling business and the purchase of grain, &c. The incorporators were Jacob Krieger, Sr., David Frantz, Sr., and J. C. Eisenman. The capital stock of the corporation was fifty thousand dollars, and by its terms the corporation could begin business when two-fifths of its stock had been paid in. There is some conflict in the testimony as to whether as much stock as twenty thousand dollars had been paid when the corporation began to deal with the public, and we shall assume,

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for the purposes of this case, that only fifteen thousand dollars of paid-up stock was in the vaults of the corporation at that time. J. C. Eisenman, the appellee here, purchased up the stock of the corporation, and became the sole owner of all the stock and the corporate property. This purchase was made in January, 1889. The appellee, on account of his individual indorsements for the corporation, made an assignment to the Germania Safety Vault and Trust Company, and the assignee instituted this action for the purpose of settling up the estate assigned, and its distribution among creditors. On the — day of October, 1889, the corporation also transferred its assets to the Trust Company for the payment of its debts. In the months of September, October and November of the year 1889, a firm known as J. C. Mattingly & Sons, engaged in the manufacture and sale of whisky, drew their drafts on the corporation of Eisenman Bros. & Co. for large sums of money, amounting in all to about twenty thousand dollars. The drafts were accepted by the corporation, indorsed by Mattingly & Sons, and discounted by the Louisville Banking Company, the appellant in this case, and placed to the credit of J. C. Mattingly & Sons. The corporation of Eisenman Bros. & Co. had no interest in the loans, but had accepted the paper for the accommodation of J. C. Mattingly & Sons, and of that fact the appellant, from the facts and circumstances of this case, must have been fully apprised, and but for the failure of Mattingly & Sons the corporation of Eisenman Bros. & Co. would have continued solvent.

The appellant instituted its action at law and recovered a judgment against the corporation of Eisenman Bros. & Co., on the paper of Mattingly & Sons, and had an execution issued with a return of no property found. Having been made a defendant to the action for a settlement of the estate of the appellee by his assignee, the Germania Trust Company, the appellant is seeking to make J. C. Eisenman liable in his individual right for the amount of the Mattingly notes upon two grounds. *First.* The corporation of Eisenman Bros. & Co. practiced a fraud on the public when it announced that it had two-fifths of its capital stock paid in. *Second.* That J. C. Eisenman having purchased all the stock of the corporation, the corporation ceased to exist; and the latter having indorsed or accepted the paper, although in the corporate name, will not be allowed to say that it was a corporate liability, and more particularly when the fact of Eisenman being the sole owner of the stock was unknown to the appellant.

The formation of this corporation, of which the appellee was a member, was had under the General Statutes, and it is proper, therefore, to refer to some of the provisions of the statute on that subject, in order to a correct decision of the questions made by the appellant.

Section 1 of chapter 56, General Statutes, provides that "any number of persons may associate themselves *together* and become incorporated for the transaction of any lawful business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not



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possessed by natural persons, except as hereinafter provided."

It is, we think, manifest the Legislature never intended to permit one person to conduct his ordinary business in the name of a corporation, so as to exempt him from personal liability, or his property not embraced by or used in his corporate business from the payment of a debt for no other reason than its being a debt of the corporation. The purpose of the statute was to enable two or more persons possessed of capital or skill to associate themselves in business, and to limit their liability as against the improvident acts of each other, or the act of the corporation, in the event of pecuniary loss in the legitimate and proper conduct of its business. It invites the investment of the capital stock of one to be placed in the same business with the skill of another, or a combination of capital that encourages trade, the burden of which mere individual enterprise would be unwilling to assume, and it could not have been the legislative intent that any one man could form a corporation of which he is the creature and sole stockholder, so as to limit his liability for debts contracted, and from which he has derived the benefit, to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation—it is his. He can sell or dispose of it as he pleases; borrow money, acquire property, in the name of the corporation, for the sole purpose of exempting him from any responsibility, other than that belonging to the corporation; and however reckless or improvident he may be, he has

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all to gain and nothing to lose. He could make a gift of the entire corporate estate, dispense with all corporate forms, and to say, when exercising such unlimited control, he is not personally responsible for every debt he contracts, would be to pervert the plain purpose of the statute.

There is no such being in this State as a sole corporation, and certainly none such allowed to be created by the statute.

This corporation, however, was properly organized, had its several stockholders and board of directors, and was prospering in its business until these drafts were drawn for the benefit of Mattingly & Sons. The drafts were all made payable at the Masonic Savings Bank, and no direct transaction was had by the appellee and the appellant with reference to the paper. There is, in fact, no evidence showing that the corporation ever authorized the acceptance of these drafts, and while the paper was negotiable, if the corporation actually existed, its liability on the paper might well be questioned. The appellant, however, maintains that this appellee, when he signed the corporate name to these drafts, was the sole owner of the stock, and that from the moment he purchased the stock of Krieger and Frantz, the corporation ceased to exist.

The corporation may have been virtually dissolved, and yet we are not disposed to hold the appellee personally liable for the amount of the drafts discounted by the bank. That both the appellant and appellee were acting on the belief that the corporation was alone liable is beyond dispute, and the corporation, as it was called, the appellee being the sole

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owner of the stock, submitted to a judgment against it for the drafts in an action by the bank, and the appellee is making no resistance to its payment out of the property of the corporation, but insists that no personal liability exists. The appellant has obtained all he contracted for. There was no fraud practiced upon it by the appellee, and certainly no intention to bind himself personally, nor any of the proceeds of these drafts applied to his benefit in any manner, or to the benefit of what he supposed was an existing corporation. If the stock had been held as it was originally, the pecuniary condition of the corporation would have been the same, as no act had been done by the appellee by which the interest of creditors or those dealing with the corporation would have been prejudiced. Nor are we prepared to adjudge, after a corporation has been created by the statute, with the stock distributed among several stockholders, that the purchase by one stockholder of all the stock destroys the corporate existence, and places all the property of the corporation upon the same footing with the other estate of the individual stockholder. The legal title to the estate of the corporation is still vested in it, and while the stockholder's interest could be subjected to the payment even of his individual debt, when he contracts in behalf of the corporation, and with no fraudulent intent, it seems to us the party with whom he contracts gets all he bargains for when he subjects the corporate property to the payment of his debt.

In the case of *Swift v. Smith*, 65 Md., 428, Cruikshanks owned all the stock of the corporation, and

executed a mortgage on the corporate property to Swift to secure the latter in the sum of seventeen thousand dollars loaned the corporation. The mortgage was signed by Cruikshanks in his own name and that of the corporation, and subsequently Cruikshanks sold shares of stock to third parties, who claimed that this mortgage executed by the sole owner, Cruikshanks, had no precedence over their stock; that it was the individual act of Cruikshanks, and not that of the corporation. The court held that the stockholders took their stock subject to the mortgage, and said that whether in the name of the corporation or the individual stockholder, the latter being the absolute owner in equity if not in law, the mortgage was effectual, and the subsequent purchasers of stock took their interests in the corporate property with the equities or incumbrances placed upon it when Cruikshanks was the sole owner. It is said in that case that "while the purchase by Cruikshanks of all the stock in the corporation, and all its property, did not necessarily work a surrender of the franchise, it did virtually, for the time being, suspend its operation as a corporation until the election of new officers through new stockholders purchasing from Cruikshanks. If, from the moment Cruikshanks became the real owner, he had concluded to transact the business as an individual, and without the corporate name, can it be doubted that the mortgage created a valid equitable lien on the property," &c.

The case cited comes nearer adjudging that a purchase of all the stock by one stockholder dissolves

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the corporation than any we have found, and still such an act, in the light of the opinion, only suspends the operation of the charter, and places the stockholder in a condition where he may abandon its provisions and control the property as his individual estate.

In the case before us there was no surrender of the franchise, but the business conducted in good faith and under the belief that the corporate estate was alone liable. The corporation still lived, and had such vitality as enabled the holder of the stock to transfer it, and proceed with the corporate powers as if he had never become the sole owner; and the argument that such a construction as to the meaning of the statute would enable two or more to organize a corporation, with a view of vesting the entire stock in one of the corporators, is not available, for the reason that the corporate property in the hands of one stockholder, when made liable by him for his corporate or individual debts, remains so, although he may transfer the stock to others, as they must take it subject to the incumbrances the sole stockholder has placed upon it prior to his sale of the stock. It must be recollected that we are determining alone, in this case, the meaning of the statute under which these corporations are formed; as it is plain, as to both public and private corporations, unless otherwise provided by the charter, the title to the corporate property still remains in the corporation, although one may become the sole owner of the stock. In *Button v. Hoffman*, reported in 61 Wis., 20, it was held that one having purchased all the

stock of a private corporation does not, thereby, become the owner of the property, and to maintain replevin must bring the action in the corporate name. In *Wilde v. Jenkins*, 4 Paige, 481, it is said: "A conveyance of all the stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on the business under the act of incorporation and in the corporate name." In *Winona, &c., R. Co. v. St. Paul, &c., R. Co.*, 23 Minn., 359, it is said: "The corporation is still the absolute owner, and vested with the legal title to the property, and the real party in interest, although another party has become the sole beneficial owner in its rights, property and immunities." The elementary writers on the subject all concur in holding that the fact of one person becoming the owner of all the shares of stock, does not work a dissolution of the corporation. (Cook on Stock, &c., 2d ed., sec. 631; Morawetz on Private Corporations, page 635.)

While we recognize the general rule on the subject sustained by the authorities referred to, it must be held that the purchase by one of all the shares in a corporation *created under the statute*, is a dissolution of the corporation, to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock, in good faith, so as to maintain an organization under the statute. There is a difference between the attempt to create one person a corporation under this statute, and the purchase, in good faith, of all the stock after the corporation has been created. In the first instance there is no corporation, and in the last there is a franchise, the

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operations of which are suspended until the stock may be transferred to others; and while in the hands of one person the corporate and individual property are ordinarily alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them.

In the present case, as before stated, there had been no change in the property or conduct of the business as to mislead or injure creditors. No fraud had been practiced by the appellee, and the entire credit was not only given the corporation, but the appellant had pursued it to judgment, and when in a court of equity, the appellant should be confined in distributing the property of the corporation to its *pro rata* share of the proceeds, and neither the individual estate of the appellee assigned for the benefit of creditors or the appellee made personally liable for these debts to the bank.

It is said the appellee is liable to the corporation for stock subscribed and unpaid, and if so, his liability to the corporation exists, and the amount of stock owing by him, when collected, becomes a part of the corporate assets, to be distributed among the creditors of the corporation. The appellant is not entitled to the whole, unless it is the sole creditor, and so the chancellor below adjudged. The statute makes the members of the corporation, or such of them who are guilty of intentional fraud in failing or refusing to comply substantially with the articles of incorporation, liable to an indictment, and it is urged in argu-

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ment that the failure to pay up all the stock agreed to be paid by the act of incorporation was a fraud on the appellant, who did not deal with the corporation until long after it began to do business. If the stock was not paid up, this, in the absence of a fraudulent purpose, did not make the stockholder individually liable for all the debts of the corporation; and besides, the proof shows that the stock paid in and the assets of the corporation were amply sufficient to pay all the indebtedness, excepting the drafts drawn by Mattingly & Sons, and this indebtedness was created long after the corporation had been organized and was conducting a prosperous business. This view of the question is sustained by the case of *National Bank of Salem v. Almy & Co.*, reported in 117 Mass., 476.

We perceive no reason for reversing the judgment below, and the same is affirmed.

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To a petition for rehearing filed by counsel for appellant, Judge PRYOR delivered the following response of the Court:

There is a manifest distinction between this case and *Brannin, &c., v. Loving, &c.*, 82 Ky., 370. In that case the corporation for its own benefit drew on *Spillman & Mitchell* for five thousand dollars. The paper was accepted by them for accommodation, and afterward indorsed to *Brannin & Co.* by the president of the corporation, who knew the condition of the corporation, and that he was violating the provisions of the charter. In this case the corporation of *Eisenman*



## Hill v. Thixton, &amp;c.

& Bros. were the acceptors for accommodation only, and it is apparent the bank knew it; and not only so, the bank pursued the corporation to judgment, and is now in a court of equity seeking to subject not only the assets of the corporation, but to make its president personally responsible for the debt.

The good faith of the appellee can not be questioned. The appellant obtained all it bargained for, and there is no reason for fixing an individual liability on Eisenman for this debt.

Petition overruled.

## CASE 14—PETITION ORDINARY—FEBRUARY 23.

## Hill v. Thixton, &amp;c.

## APPEAL FROM DAVEISS CIRCUIT COURT.

1. FRAUD—CERTIFICATE OF OBLIGOR THAT THERE IS NO DEFENSE TO NOTE.—Where the obligor in a note accompanies it with a certificate that it is a *bona fide* debt against him, that "there is no offset, discount or counter-claim or defense against the same," and that it will be paid at maturity, he is not estopped, even as against one who has purchased the note upon the faith of the certificate, to impeach the note for fraud, provided he alleges and proves that the certificate was also obtained by fraud.
2. TRANSFER OF PEDDLER'S LICENSE—The withdrawal of one member of a firm to which a peddler's license has been issued, does not deprive the remaining members of the firm of the right to do business under the license. This is not such a transfer of the license as the statute denounces.

## J. A. DEAN FOR APPELLANT.

As the payees of the note sued on were peddlers, and had not taken out license as required by law, there can be no recovery on the note. (*Rash v. Holloway*, 82 Ky., 674; *Rash v. Farley*, 12 Ky. Law Rep., 918.)

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**WEIR, WEIR & WALKER FOR APPELLEES.**

If the plaintiffs in the purchase of the note relied upon the statements in the certificates, they operate to estop the defendant from relying upon the defense of want of consideration and fraud in procuring the note. (*Crabtree v. Atchison*, 18 Ky. Law Rep., 321; *Wells v. Lewis*, 4 Met., 270; *Rudd v. Matthews*, 79 Ky., 486.)

**C. S. WALKER ON SAME SIDE IN PETITION FOR REHEARING.**

Cited: *Jaqua v. Montgomery* (38 Ind., 36), 5 Am. Rep., 168; *Dickerson v. Colgrove*, 100 U. S., 578; *Kellogg v. Curtis* (69 Me., 212), 31 Am. Rep., 274; *Swift v. Smith*, 102 U. S., 442; *Crumwell v. Sac County*, 96 U. S., 68; *Goodman v. Simonds*, 61 U. S., 348; *Greenwood v. Hayden*, 78 Ky., 338.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

In the summer of 1888 Hill, the appellant, who was a timid and unlettered man, was visited by a stranger, who induced his assistance toward starting his lightning-rod enterprise in the neighborhood by obtaining a promise to let him rod his house, assuring him that it would cost him only four dollars. In a few days some four other strangers appeared, and proceeded to decorate his humble shanty with the most improved lightning conductors "known to science." After completing the job they asked him to sign some papers which they called "recommendations," purporting to prove to the neighbors the good character of the work. He signed his name to two of these papers. He could not read writing, and could scarcely write his name. They then presented him a note to sign for one hundred and seven dollars and ten cents, due in six months. He refused to do so. They became mad, and told him he had to sign it. Angry words passed, threats were made, and finally appellant called on his mother for help. The talk was

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continued, the men declaring that he must sign the note. They threatened to sell his home in the United States Court. To stop the excitement among the men and prevent a difficulty, he finally signed it.

Coleman, a witness, who was present and working for the strangers, and who had come there with them, testifies that he was employed by the lightning-rod men; that "Hill refused to sign the note; Mr. Medanich told him he must sign the note; that they employed lawyers by the year, and that a number of suits did not cost them any more than one suit; that they did not sue in these little courts here, but they did all their business in the United States Court. Mr. Hill still refused to sign the note, and pretty hot words followed. Mr. Hill seemed to be a very timid man, and they scared him into signing the note by threatening him. These men were very vicious, bullying kind of men, and were very dangerous men; that from conversations with the men, he learned that the cost of the rod put up for Hill was about seven dollars, and that the profits were about one hundred dollars on the job."

In June, 1889, the appellees, Thixton and Atchison, claiming to be the owners and holders of the note, sued Hill, the appellee, thereon, in the Daveiss Circuit Court. He answered that the note was not his act and deed—that the words "negotiable and payable at the bank of Owensboro, Ky.," had been inserted therein after he had put his name to it, and without his knowledge or consent. That it had been procured, in its original form, by fraud, oppression and intimidation, and he had executed it to save himself

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from personal violence, and to avoid bodily harm with which he was threatened. He also alleged that the plaintiffs' assignors were peddlers, and had no license as provided by law. Upon the state of case thus presented, we presume that no court would sanction the enforcement of the contract and collection of the note sued on. As a matter of fact, on the trial there was no contrariety of testimony, the foregoing facts being established by Hill, the appellee, and Coleman, the employe of the payees of the note, and while denied in the reply, were not contradicted by proof.

But in their reply the appellees rely on the following writings, signed and delivered, as they allege, on the day the note was executed, as an estoppel against any defense to note sued on, and as precluding a court of justice from relieving this timid and ignorant countryman from this bold robbery. The writings are as follows:

"RECOMMENDATION.

"To All Whom it May Concern:

"This is to certify that J. Medanich & Co., agents of the Franklin Lightning Rod Co., has erected their copper covered lightning conductor on my residence, and has done me good work and given satisfaction in every respect.

"I take pleasure in recommending them to all in need of rods. July 7th, 1888.

(Signed)

"W. H. HILL."

"To All Whom it May Concern:

"This is to certify that a note executed by me to J. Medanich & Co., for one hundred and seven dollars and ten cents, due in six months, is a *bona fide*

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debt against me, and there is no offset, discount or counter-claim or defense against the same; and the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co., or to such persons as they may assign said note to.

“Given under my hand this, the 7th day of July, 1888. (Signed) W. H. HILL.”

Appellees also attempted to avoid the alleged want of license by filing one granted regularly to Medanich, Shay & Co. (the Co. being Freeman), alleging that Shay had retired from the firm, and that the business was being conducted by Medanich and Freeman, the surviving members; and this, we think, was a valid license, and not such a transfer as the statute denounces. The appellees alleged that the certificate of recommendation showed on its face that the work had been done by the Franklin Lightning-rod Company, which produced no license, and that the plaintiffs' assignors were only agents. The second certificate was lost, and he alleges want of knowledge or information as to signing it, and that if he did so, it was procured by fraud, overreaching and deceit, and with intent to estop him in his defense, of which facts the plaintiffs had notice before they bought the note, and knew also that the transaction and circumstances under which the note originated were suspicious, and sufficient to have put them on inquiry.

The trial court properly instructed the jury on the subject of the alteration of the note after its execution and delivery, and as to its procurement by fraud, threats, &c., but expressly modified these instructions

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by telling the jury to find for the plaintiffs, even if they believed the note to have been materially altered, or had been obtained by fraud, threats, &c., provided they further believed that the plaintiffs bought and became the owners of the note in good faith, relying on the statements contained in the two certificates named above, and provided the defendant had signed the papers. Thus is presented for our consideration the real question in this case, and that is, what effect is to be given the certificate agreeing not to set up any defense?

The court below assumed that the note itself, containing an absolute promise on its face to pay the sum named at its maturity, and importing absolute verity, might be impeached for fraud in its procurement, and yet the certificates, executed at the same time, importing nothing more than is certainly and definitely implied in the note, could not be so impeached.

If the maker may have been overreached in the execution of the one, why may he not have been in the execution of the other? And if he can impeach one, why may he not the other? The case of *Crabtree v. Atchison*, 93 Ky., 338, is relied on by appellees. In that case it is said that "the writing delivered to the payees of the note, and exhibited to the appellees by the payees to induce them to purchase it, and upon the assurances of which they relied in making the purchase, was equivalent to personal assurances made to the appellees by the appellant face to face, to induce them to make the purchase, and upon which they relied in making the

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purchase." That is, that the assurance that he had no defense was a continuing, ever present and existing truth, asserted "face to face" to "whomsoever it might concern," and as such must estop the appellee from denying the truth of such assurance. But was not the absolute promise of the appellee contained in the other writing executed at the same time (the note), agreeing to pay the sum of one hundred and seven dollars and ten cents in six months after date, at the Bank of Commerce of Owensboro, Ky., a continuing and existing promise, and which the payees were at liberty to exhibit to the appellees and the world as an inducement to buy the paper?

And why shall the one be said to have the force of a "face to face" assurance, that "the same is good against me for the full amount thereof, and will be paid at maturity," any more than the other is a "face to face" assurance that "I will pay the sum of one hundred and seven dollars and ten cents," which was the full amount of the note, "in six months," which was at its maturity?

In the case of *Crabtree v. Atchison*, *supra*, the answer was not deemed sufficiently explicit to raise the question of fraud in the procurement of the certificate, and the case was reversed on other grounds. The principle announced followed the case of *Wells, &c., v. Lewis, &c.*, 4 Met., 269, and no fraud was properly alleged by the defendant as to the obtention of the certificate.

We are clear that there is no difference in principle between the assurance given in the note and that given in the certificate. And yet we know that a

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subsequent "face to face" assurance, given by the maker of a note that he would pay the amount of it at its maturity, is an estoppel against his assertion of any defense thereto. We conclude, therefore, that as the promise in the note can not be given the force of a personal and continual assurance, so can not that effect be given the other and accompanying paper.

They are in effect a single transaction, and are to be considered as if embodied in but a single paper; executed and delivered together, they stand or fall together. What may be used to impeach the one may be used to impeach the other.

There is not an idea or thought expressed in the one paper which is not expressed in the other. In the certificate we have that which is but the extended meaning of the note—"bona fide debt against me." Certainly the note distinctly imports as much. "No offset, discount or counter-claim or defense;" of course not, says the note by clear implication. "The same is good against me and will be paid at maturity." Surely these assurances are, even in express terms, embraced in the note.

The case of Wells, &c., v. Lewis, &c., 4 Met., 269, cited against this view, was where neither the note nor the accompanying paper was attacked for fraud. The consideration alone of the note was sought to be impeached, and its makers having voluntarily given the certificate that they had no offset in order to give currency to their paper, would have been guilty of perpetrating a fraud on the innocent holder if defense had been allowed. If the note and its accompanying "letter of credit" were executed voluntarily, and free



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from imposition and fraud, then recovery should be had; if the note or its "certificate of good character" were not so obtained, then whatever defense, discount or offset might have been used against the original obligee may be used against the assignee.

Such is the purport of the statute regulating the assignment of such paper. Moreover, we are by no means certain that the appellees were free from notice sufficient to have put them on inquiry. They had been told by a party from whom they were seeking information as to his solvency that Hill was poor; that his brother was putting up the money with which to buy the little farm; that he was too good a man to be imposed on by lightning-rod men, and that there was certainly something wrong about the note. Upon presentation of the note alone of the appellant, importing as it did a valid consideration, and containing an express promise to pay in the usual form, a purchase would have been more in accordance with the usual course of trade than when the holder shows evidence of the necessity of fortifying his property by a suspicious overshoot of virtue. It was a statement on which they had but slim right to rely. It was indeed calculated to arouse and excite suspicion. An ordinary and unsuspecting-looking promissory note was in bad company when it had to be backed up by such an unusual paper. The majority opinion of the court in *Jaqua v. Montgomery*, 33 Ind., 36, sustains this view. In that case Gregory, C. J., who delivered one of the opinions, in speaking of such an accompanying paper, says "it looks too much like the act of the thief in attempting to cover up his crime."

The judgment below is reversed, with directions to allow the case to proceed according to the principles of this opinion. Chief Justice Bennett dissenting.

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Chief Justice BENNETT delivered the following dissenting opinion :

The appellees, as the assignees of J. Medanich & Co., sued the appellant on a note for one hundred and seven dollars. To the plea of no consideration, fraud and duress, the appellees replied that they were purchasers of the note for value, and without notice of the matters alleged, and were induced to make the purchase by the representation of the appellant contained in a writing signed by him and delivered to Medanich & Co., to be used by them in inducing the sale of the note, and which induced the appellees to purchase it. Said writing represents the debt as being *bona fide* against the appellant, that "there is no offset, discount or counter-claim or defense against the same; that the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co., or to such persons as they may assign said note to." The appellees relied upon said representations as an estoppel to the defenses indicated, which the lower court sustained and which the Superior Court affirmed. It will be seen that the opinion of the majority of the court reverses the lower court and the Superior Court, upon the ground that the estoppel pleaded was not available if J. Medanich & Co. had defrauded the appellant in obtaining the note and writing. That this is the meaning of

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the opinion, there can be no doubt. In order for the court to reach its conclusion, it found itself compelled, although disclaiming it verbally, to ignore and overrule the cardinal feature of the law of estoppel, as expressed by its own reported decision, to wit: If a person, by his false speech or conduct, induce another person to act differently from what he would have otherwise acted, such person can not thereafter deny the truth of his speech or conduct, and show the real truth of the matter, because such showing would be a deception and fraud, practiced upon an innocent person. Such person is estopped to deny the truth of his speech or conduct, although he may have been deceived and defrauded into such speech or conduct by other persons, provided the person thus influenced was innocent and ignorant of the fraud of such other persons. So, also, if such person authorizes a person to make certain assurances to another person that certain things are true, and which assurances such person does, in good faith, act on as true, it is equally well settled that the person authorizing the assurances can not deny their truth; for to allow him to do so would be a fraud upon the person thus acting upon them. In such case the person authorizing the assurances would not, as against the person acting upon them, be allowed to show that the person whom he authorized to make them in his behalf, had obtained the authority by defrauding him; because the person who acted on the assurance would be, nevertheless, defrauded by the person giving the authority. It seems to be perfectly settled that if two persons are defrauded, and loss must fall upon

one or the other, that one that acts in bringing the fraud about must suffer the consequences—the loss must fall on him. He, in equity, is the wrong-doer. He has intrusted the authority to another to say to still another or others, that he would do so and so in order to induce them to act, and if such other rely upon that information as true, and act upon it, but it turns out that the person giving the authority was defrauded by the person to whom it was given, he must bear the loss, for to allow the person giving the authority to repudiate the act, because the person to whom he gave it defrauded him, would be to allow him to defraud the person who acted in good faith upon the authority given. Therefore, which one of these innocent persons should bear the burden of the fraud? I say it is perfectly well settled that the person giving the authority must bear the burden, because but for him the person acting on the authority would not have been defrauded, and he must bear the loss as far as such person is concerned, and look alone to the person that wronged him for redress. It may be that his hope from that source is non-availing; but that fact does not justify him in perpetrating a wrong upon such person whom he has induced to act upon a falsehood and worst his condition. I say that in a case like this, it is the fraud practiced by the person upon another that estops him from denying the truth of his assertion, upon the truth of which the other person has been induced to act and change his condition.

The opinion holds that the note and paper giving the assurance that Hill had no offset or defense to

the note, and it would be paid to the assignee, were simultaneously executed, and must be regarded as one and the same transaction. And as the promise contained in the note implied as much as said writing expressed, and as the payor was not cut off from his defense of fraud, etc., in the obtention of the note in the hands of the assignee; so, likewise, he might make the same defense to the simultaneous writing—both being but one transaction and subject to the same defenses in the hands of the assignee.

This view of the case certainly, in effect, overrules the case of *Crabtree v. Atchison*, 93 Ky., 338; for the same written assurance was relied on in that case as in this case, and the pleas of no consideration and fraud made, and the plea of estoppel made to said pleas as in this case. And this court, all of the judges concurring, decided that the assurances given in said writing, and which induced the assignee to make the purchase, estopped Crabtree from asserting the truth, by showing no consideration and fraud. Say what you please, but I have given the plain, practical meaning of the decision, which is in effect overruled. But the court seems unable to see the difference between the note's promise and the promise contained in the agreement. But let us see if there is not a wide and valid difference. A promissory note by chapter 22, section 6, General Statutes, is subject to all defenses in the hands of an assignee that might be used against the payee; therefore, the promise to pay contained in the note is made subject to defenses, &c. But it is undoubtedly the law that the payor may agree and bind himself for a valuable consideration to make no defense as against the payee.

And also, he may, without the valuable consideration, estop himself from making defenses as against an assignee of the note. Why? Because if he gives assurance to the assignee that the note is not subject to defense, and the assignee is induced to buy it upon the faith of that assurance, the maker would commit a fraud upon him, if allowed to deny the truth of the assurance; therefore, to prevent the fraud he is estopped to deny it. But the opinion says if it is a simultaneous agreement, it becomes a part of the note and the rule does not apply. Well, suppose the agreement was contained in the note itself, and the assignee should be induced to purchase it upon the faith of the assurance, would not the maker be estopped to deny it? Why not? The assurance is an agreement, not an essential part of a simple promissory note, but an addition to it. The simple promise by the note to pay is made subject to all defenses in the hands of the assignee that could be made against the payee. And the agreement, although contained in the note, is an addition or collateral to the simple promise and estops the payor from setting up defenses as against the assignee, because of the fraud that he would practice upon him by so doing.

Now as to the simultaneous agreement not effecting an estoppel, it seems that this court is fully committed the other way. In the case of *Barbaroux v. Barker*, 4 Met., 47, the appellant and Holbrooke executed to each other their respective promissory notes for preceding indebtedness, agreeing that each might use the note executed to him for the purpose of raising money. *Barbaroux*, at the time he executed his note, gave to *Holbrooke* a writing, saying:

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"You may use my notes anywhere you can," except, &c. To a suit by Holbrooke's assignee on the note executed by Barbaroux, the latter pleaded Holbrooke's note as an offset, but the court held that Barbaroux was estopped from pleading the offset against the assignee, because to allow it would be a "fraud" upon him. In the case of *Smith v. Stone*, 17 B. M., 170, the assignee's agent asked the maker of the note, before the assignment, if the note was all right, and he replied that it was, and would be paid at maturity, and upon the faith of which the note was purchased. It was held that the maker was estopped from making defense to the note in the hands of the assignee, because it would be a fraud upon him. Now the two cases in 4 Met.—one referred to in the opinion—show that the agreements that estopped the makers of the instruments were made simultaneously with the promises, and that the court held such simultaneous agreements to work an estoppel in favor of the assignee. And without fatiguing the reader with any more citations, I can assure him that there are many more authorities, including this court, to the same effect. But it is said that inasmuch as the simultaneous writing was obtained by fraud, Mr. Hill is not estopped from defending, although innocent parties were induced by the assurances to buy the note. But it seems to me that this view destroys, in a great measure, the doctrine of estoppel; the controlling and essential feature of which is to prevent fraud by estopping a person whose assurances have been given to induce others to act, and but for which they would not have thus acted, from denying the truth of the assurances.

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To allow the person giving the assurances to say he was mistaken, or he was defrauded into making them by a third person, would defeat the very object that equity has in view in estopping him, and strip the doctrine of its beauty; for there is nothing more repulsive to honest and fair dealing than to allow a person to say, "It is true I, in order to induce you to buy this note at its fair value, agreed with you that it would be subject to no defense in your hands, and it would be promptly paid to you, and, thus induced, you did buy it at its fair value, and without notice of any infirmity; but as the person to whom I gave the assurance, in order for him to give it to you, obtained the assurance by fraud, I am therefore authorized to defraud you." But, says the other person, it is well settled that if a loss is to fall upon either of us by reason of the fraud of that other person, it should fall upon you, because you authorized him to give me your assurance, which he did, and by which I was influenced to make the purchase, and I did not know, and had no reason to believe, that he obtained the assurance from you by fraud; but you nevertheless gave out the assurance, and caused the fraud to be practiced upon me; so you should therefore bear the loss, and not me, who is entirely innocent. Oh! oh! says the other, you forget that the written assurance that I sent you by that person was made simultaneously with said note; therefore, I am not estopped to deny it even as against you—an innocent purchaser deceived and defrauded by the assurances given out by me that it was obtained from me by fraud; but if I had sent it out



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just an hour or two afterwards as an independent agreement, you would have had me bound hard and fast, but as it is I have got you, old boy; the loss must fall upon you, and I go scot free.

It is true, I recognise the equity of the rule that if I give out assurances intending you to act on them as true, and you do act upon them as true, I can not thereafter say, so far as you are concerned, they were untrue, if my saying so would affect your rights, acquired upon the faith of those assurances, although the assurances were obtained from me by the fraud of the person that gave them to you for me, because it would be a fraud upon you for me to do so. And, although I was defrauded by such person into giving the assurances upon which you acted, I should bear the loss instead of you, because the loss should fall upon the one that caused it, and as I, so far as you are concerned, caused it, I should bear the loss and not you; but the court has, luckily for me, but wholly unexpected by me, come to my relief, because I happened to execute a note about the same time that I executed the assurance upon which you acted, which was obtained from me by the fraud of another person, and which fraud releases me and shifts the loss upon you, who had nothing whatever to do with the fraud upon me, but was an innocent party all the way through. Natural justice requires that I should bear the loss instead of you, because I sent those assurances to you independently of the simple promise in the note as an additional inducement to you to buy the note. But law is law, and thus it is recently written, and we are all bound thereby. But here are the Metcalfe cases, the Ben Monroe cases,

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and others, and lastly, the Crabtree case, that say the fact that the agreement was made simultaneously with the note makes no difference; that the agreement is not merely a simple promise to pay and subject to all defenses; but it is a substantive agreement that binds the party, and he is estopped to deny it, if the denial affects the rights of the person acquired upon the faith of the agreement. Yes, yes, that is all true; but you had just as well take leave of the late lamented Crabtree, who, in October, 1892, was required to pay out his hard dollars because he was estopped from denying the truth of this same agreement, because the denial would defraud you. But in February, 1893, there was new light turned on by Indiana, and I am released from the very same obligation, because the fraud I perpetrated upon you does not estop me from showing that that sweet-scented geranium that I sent to you as the bearer of my assurances, and upon which you acted in good faith, acted the rascal with me, and in order to get even with him I am privileged, under the sporadic decision of Indiana, to act the rascal with you, and mulct you for acting upon the truth of the assurances. You should have known better, you idiot; and for your folly you must bear the loss, not me. I should have known better! How could I have known better? Instinct, Instinct! Hal, is a great thing. You should have known better "on instinct." But there is another precedent in favor of the Indiana opinion that I came near forgetting. I allude to the celebrated speech of Old Man Sixty before Judge Cissell, of Henderson, Kentucky. He said: "Everybody cheats me and I cheats everybody, and

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everybody dat I cheats must submit, because everybody cheats me; dat is equity for you, sir."

But it is stated in the opinion that the Crabtree opinion was reversed on "other grounds." Well, it was reversed upon the one ground of error in the lower court as to the order of argument, but is as true as truth itself that it was in all other respects affirmed, because the simultaneous writing having induced others to act, Mr. Crabtree would have committed a fraud upon them had he been allowed to deny the truth of the writing.

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CASE 15—PETITION ORDINARY—FEBRUARY 25.

## Wright v. Cincinnati, &amp;c., R. Co.

## APPEAL FROM LINCOLN CIRCUIT COURT.

1. CONTRIBUTORY NEGLIGENCE—FAILURE TO STOP AT RAILROAD CROSSING AND LOOK.—If one approaches a railway track and attempts to cross without looking the one way or the other, no other fact appearing, and is injured, no recovery can be had unless those in charge of the train could have avoided the injury by the exercise of ordinary care, after the danger was discovered. But there may be circumstances which will excuse the failure to look before attempting to cross the track, and if the facts are such that men of ordinary judgment might differ as to whether the person injured, notwithstanding his failure to look along the track, exercised that degree of care that prudent persons would ordinarily exercise under the circumstances, the question of contributory negligence is for the jury.

The plaintiff in this case was driving in a buggy on a turnpike road, which, for some distance, ran parallel with the track of defendant's railroad. As he approached a crossing of the two roads he looked behind him several times, the last time when within one hundred yards of the crossing, and, seeing no train, the view being unobstructed for a mile back, he attempted to cross the track with-

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out looking back again, and was struck by a passing train, which the testimony tends to show was moving at the rate of sixty miles an hour, and without any signal of its approach to the crossing. The train was behind time, and plaintiff, knowing the usual hour for the passing of the train, had reason to believe that it had passed. *Held*—That it was error to give a peremptory instruction for defendant. The question of contributory negligence, as well as the question of negligence on the part of defendant, should have been submitted to the jury.

2. THE PLEA OF CONTRIBUTORY NEGLIGENCE was not inconsistent with the denial of the negligence alleged in the petition, and the defendant had the right to rely upon both defenses.

W. G. WELCH, M. C. SAUFLEY FOR APPELLANT.

Plaintiff was not guilty of contributory negligence in not stopping. It is only where there can be no sight or no hearing without stopping that stopping is held to be necessary.

C. B. SIMRALL FOR APPELLEE.

1. The facts being conceded upon which the claim of contributory negligence was based, contributory negligence became a question of law. (*Lou. & Portland Canal Co. v. Murphy's Adm'r*, 9 Bush, 538; *Dolfinger & Co. v. Fishback*, 12 Bush, 479; *Beach on Cont. Negligence*, sec. 162.)
2. A traveler approaching a railroad crossing must "look and listen" for the approach of trains, and the failure to so "look and listen" is such contributory negligence as will bar recovery. (*C. R. I. & P. R. R. v. Houston*, 95 U. S., 697. *Alabama*—*L. & N. R. R. Co. v. Crawford*, 44 Am. & Eng. Ry. Cases, 568. *West Virginia*—*Begel v. Newport N. & M. V. R. R.*, 45 Am. & Eng. Ry. Cases, 188. *Wisconsin*—*Williams v. Chicago, Minn. & St. Paul R. R.*, 28 Am. & Eng. Ry. Cases, 274. *Illinois*—*Chicago & N. W. R. R. v. Dimick*, 2 Am. & Eng. Ry. Cases, 202. *Oregon*—*Durbin v. Oregon Ry. Nav. Co.*, 32 Am. & Eng. Ry. Cases, 149. *Virginia*—*N. Y., Phila. & Norfolk R. R. v. Kellam's Adm'r*, 82 Am. & Eng. Ry. Cases, 114. *Michigan*—*Matti v. Chicago & West. Mich. R. R.*, 82 Am. & Eng. Ry. Cases, 71. *Indiana*—*Ivens v. Cin., Wabash & Mich. R. R.*, 28 Am. & Eng. Ry. Cases, 258. *New Jersey*—*Berry v. Penna. R. R.*, 26 Am. & Eng. Ry. Cases, 396. *Kansas*—*Atchison, T. & St. Fe R. R. v. Townsend*, 85 Am. & Eng. Ry. Cases, 352. *Missouri*—*Kelly v. Hannibal & St. J. R. R.*, 75 Mo., 138 (18 Am. & Eng. Ry. Cases, 688). *Iowa*—*Pence v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. Ry. Cases, 366. *Maryland*—*Maryland Cent. R. R. v. Newbern*, 19 Am. & Eng. Ry. Cases, 261. *Pennsylvania*—*Reading & Columbia R. R. v. Ritchie*, 102 Penn. St., 42b (19 Am. & Eng. Ry. Cases, 267). *North Carolina*—*Daily v. Rich. & Danvill.*

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R. R., 42 Am. & Eng. Ry. Cases, 124. *Maine*—Grows v. Maine Cent. R. R., 67 Maine, 104. *Massachusetts*—Wright v. Boston & Maine R. R., 2 Am. & Eng. Ry. Cases, 121. *Texas*—Galveston R. R. v. Bracken, 14 Am. & Eng. Ry. Cases, 691. *New York*—Connelly v. N. Y. C. & H. R. R. Co., 88 N. Y., 846. *Ohio*—B. & O. R. R. v. Whiteacre, 35 O. S., 627. *Wisconsin*—Haas v. Chicago & N. W. R. R., 41 Wis., 44. *Nevada*—Bunting v. Cent. Pac. R. R., 14 Nev., 351. *Mississippi*—New Orleans, &c., R. R. v. Mitchell, 52 Miss., 808. *South Carolina*—Ziegler v. Northeast R. R., 5 S. C., 221. *California*—Fleming v. West. Pac. R. R., 49 Cal., 253. *Minnesota*—Marty v. Chicago, St. P., Minn. & O. R. R., 32 Am. & Eng. Ry. Cases, 107; Pierce on Railroads, p. 348; Beach on Cont. Negligence, p. 193; Wharton on Negligence, sec. 884.)

3. The failure to "look and listen" (that fact being admitted or proved beyond doubt) is such contributory negligence as requires the plaintiff to be *non-suited*. (Patterson on Railway Accident Law, sec. 174; Chicago, &c., R. Co. v. Houston, 95 U. S., 699; Schofield v. Chicago, &c., R. Co., 114 U. S., 615; Connelly v. New York Cent., &c., R. Co., 88 N. Y., 846; Seefeld v. Chicago, &c., R. Co. (Wis.), 82 Am. and Eng. Ry. cases, 109; Williams v. Chicago, &c., R. Co. (Wis.), 28 Am. and Eng. Ry. cases, 274; Reading, &c., R. Co. v. Retchin, 102 Pa. St., 425; B. & O. R. Co. v. Hobbs (Md.), 19 Am. and Eng. Ry. cases, 337; Union Pac. Ry. Co. v. Adams, 33 Kan., 427; Tully v. Fitchburg R. Co., 134 Mass., 499; Henze v. St. Louis, &c., R. Co., 71 Mo., 686; Powell v. Missouri Pacific Ry. Co., 76 Mo., 80; Haas' Adm'r v. Grand Rapids, &c., R. Co., 47 Mich., 401; Penn. R. Co. v. Richter, 42 N. J., 180.)
4. When the view of the railroad track is obstructed, persons approaching the crossing must use additional care. (Patterson on Railway Accident Law, p. 171; Schaefer v. Chicago, &c., R. Co., 14 Am. and Eng. Ry. Cas., 698; Haas v. Grand Rapids, &c., R. Co., 45 Mich., 401; Paducah, &c., R. Co. v. Hoehl, 12 Bush, 44.)

J. W. ALCORN OF COUNSEL ON SAME SIDE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In the month of July of the year 1889, the appellant, in company with a friend, was in his buggy on his way to the Danville Fair, and in crossing the railway track of the appellee his buggy was struck by a passing train that demolished it, throwing appellee to the ground and seriously injuring him. He insti-

tuted this action against the railway company, alleging that his injuries resulted from the negligence of its employes; and upon the trial, in the court below, the jury was instructed to find for the defendant; and this is the error complained of on the present appeal. At a former trial of this case a verdict and judgment was rendered for the present appellant for one thousand dollars, and that sum being within the jurisdiction of the Superior Court, an appeal was taken to that court, and the judgment reversed upon an error committed by the trial court, in requiring the defendant to elect whether it would rely on the general denial of any neglect as a defense to the action, or on their plea of contributory neglect on the part of the plaintiff. The Superior Court held that the pleas were not inconsistent, and that both defenses could be relied on, which, we think, was proper. On the return of the case, a non-suit having been ordered, and the sum claimed as damages being within the jurisdiction of this court, the case is now heard.

It seems that the turnpike and the track of the railroad run parallel for some distance, and where, or near the point at which, the appellant started on his journey, is a small village called Moreland, and about one and a quarter miles of Moreland is another small village called Milledgeville. The railway track crosses the turnpike twice between these villages. Moreland is south of Milledgeville, and the appellant was traveling north when the train struck him. Starting then from Moreland, when you get eight or nine hundred yards from that

town the track of the railway crosses the turnpike, and about seven or eight hundred yards from this first crossing the railway track again crosses the turnpike about three or four hundred yards of the village of Milledgeville.

It is a level country, and the track of the road is in plain view for over a mile from the last crossing back towards Moreland, whether on the turnpike or the railway, until you get within about ninety feet of the second crossing, where the accident happened. For this ninety feet there is a side cut in the turnpike that obstructs the view south towards Moreland. The train that did the injury was going north in the same direction the plaintiff was traveling. The testimony shows that after leaving Moreland, and when approaching the first crossing, the appellant looked back to see if there was a train behind him, and, seeing none, passed the first crossing safely. In approaching the second crossing, and when within two hundred yards of it, he looked back again, and there was no train, and again, when within seventy-five or one hundred yards of the second crossing, looked again, and saw no train, and then drove on to the track without looking any more, traveling, as we conjecture, at the rate of six or seven miles an hour, and as soon as his buggy was on the track the train struck it. The train was past due, and was running at a rapid rate of speed to make up for lost time, and must have been going at the rate of sixty miles an hour, or at a greater speed. If the distance from where the last look was made is only seventy-five or one hundred yards from the crossing, the buggy could

have been driven and passed the crossing before the train could have reached the crossing if going at the rate of fifty miles an hour; for if the testimony of the plaintiff and his friend is to be believed, there was no train to be seen at Moreland or near that village when the last attempt was made to see if there was danger. It is in proof that the appellant knew the time the train usually passed, and whether or not he had been informed that it was behind does not appear. It is also shown that no signal was given of the approach of the train. This fact appears by several witnesses for the appellant, when four or more witnesses for the appellee swear that signals were given. So, as to the warning given by the approaching train, there is such a conflict in the testimony as required that question to go to the jury as a controlling fact in the case.

It is insisted by counsel for the railway company that it is the duty of one on a highway crossing the track of a railway *to stop and listen* in order that he may know it is safe to cross, and if he had stopped and listened when he reached the track before going upon it, he might have seen the train, or heard the rumbling noise of its approach, or the sound of its whistle, and if he failed to do so, it is such contributory negligence as bars the recovery and authorizes a non-suit, although the railway company may have been guilty of neglect. It is true that the appellant, being within thirty yards of the crossing when reaching the cut, might have looked back and seen a train nearly a mile off, but having exercised the precaution that he did, it seems to us to be a question for the jury to determine whether



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or not he exercised the proper care and diligence for his safety. If one approaches a railway track and attempts to cross without looking the one way or the other, no other fact appearing, and is injured, no recovery can be had, unless the danger is discovered and could be avoided by the exercise of ordinary care, for if the facts are such as that rational minds, or men possessed of ordinary judgment, must say that the man's own neglect caused the injury, then a non-suit is proper. It must be conceded that many of the authorities referred to by the appellee sustain the view of the court below that it is negligence *per se* not to stop and listen before going upon a railway track, unless the evidence shows that it did not proximately contribute to the injury. This court has not followed or adopted such a doctrine, but, on the contrary, has held that where the circumstances under which one attempts to cross the track of a railway show that degree of care that prudent persons would ordinarily exercise under like circumstances, the negligence resulting in injury from the passing train ought not to be attributed to the party injured. It is, therefore, in nearly every case a question of both law and fact, the province of the jury being to pass on the facts under proper instructions from the court.

In the case of Cahill v. Cincinnati, &c., R. Co., 92 Ky., 345, where the injury occurred at a private crossing where those crossing the track were warned of approaching trains by signals given at a depot near to but not at the crossing, this court said: "But to decide that the failure of one to look along a railroad before attempting to cross it, is,

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under all circumstances and necessarily, negligent, would be arbitrary and without reason, for there may be evidence sufficient to satisfy one of ordinary prudence the track is clear without taking that precaution, as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, can not, upon principle, be regarded as negligent when injured by a passenger train running at an extraordinary rate of speed, hours behind time, and without any signal of its approach at the regular station."

On the facts presented by this record it is not by any means certain the appellant acted so negligently as to preclude a recovery, and while the accident might not have happened if he had stopped at the track and listened, men of ordinary judgment might well conclude that the appellee, in looking back as often as three times, and the last time when within one hundred yards of the crossing, and seeing no train for a mile back, had the right to believe, as a reasonably prudent man, that he could cross the track with safety, and particularly when he had reason to suppose the train inflicting the injury had passed, and if not, that the blowing of the whistle would warn him of the danger. The train must, in order to regain its lost time, have been running at a speed of one mile in a minute, and to say that men might not arrive at different conclusions as to whether the appellant was or not negligent, would be to leave all such questions to be decided by the court and not by the jury.

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It is plain that the crossing where the accident happened is a dangerous one, and it may, therefore, be said that greater care should have been exercised by both the appellant and the appellee; but still the question as to whether the appellee acted with proper vigilance for his safety is with the jury, and if he did, then if there was an omission of duty on the part of the appellee in failing to give proper signals by blowing its whistle as it approached this crossing with such a rapid movement of the train, thereby causing the injury, it is liable. When there is any uncertainty as to the facts establishing negligence, such as, if found to exist, would bar a recovery, it becomes a question for the jury; and, as said by Mr. Justice Cooley, in the case of the Detroit, &c., R. Co. v. Van Steinburg, 17 Mich., 99, although the judge may fix in his own mind the standard of ordinary prudence, "it is quite possible, if the same question of prudence was submitted to a jury collected from the different occupations of life, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law."

There are but two questions in this case. Did the appellant exercise such care under the circumstances as an ordinarily prudent man would have exercised for his own safety? If not, the verdict should be against him. If he did, then the inquiry arises, did

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the appellee, by its employes, give proper warning of the train's approach by blowing its whistle, such as would notify one exercising reasonable care for his own safety of the danger?

The care exercised by the appellant and that of negligence imputed to the company are the questions to go to the jury, and the facts in this case will not authorize the court to say, as a matter of law, that either existed. The judgment below should be set aside and a new trial granted. Reversed and remanded for that purpose.

Cleveland R. Co. v. Crawford, 24 Ohio St., 631; Copley v. New Haven, &c., Co., 136 Mass., 8; Tyler v. New York Railroad Co., 137 Mass., 238; Detroit, &c., R. Co. v. Van Steinburg, 17 Mich., 99.

## CASE 16—PETITION EQUITY—FEBRUARY 25.

## Conyers v. Scott.

## APPEAL FROM METCALFE CIRCUIT COURT.

1. **PASSWAYS—ADVERSE USE.**—The enjoyment of an incorporeal hereditament for as much as fifteen years creates a presumption of legal title; but the time of enjoyment is used merely as evidence to raise the presumption of a grant, and the manner of the enjoyment may be used as evidence to rebut the presumption.
2. **SAME.**—Long uninterrupted use by one person of a way over the land of another does not create the presumption of a grant, unless the use has been enjoyed under such circumstances as indicate that it has been claimed as a right, and not merely as a privilege revocable at the pleasure of the owner of the soil.

In this case the uncleared and uninclosed condition of the land where the passway in dispute is located, the customary and free use of passways through the land, and the recognized right of the owner

94	123
95	58
94	123
110	978
94	123
122	359

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to change and to discontinue at will the different passways over his land, make it evident that no person ever treated or regarded his use of the passway in dispute as any thing more than a permissive use, which the owner might revoke at any time, and the use of the way under such circumstances, for even forty or fifty years, does not deprive the owner of the land of the right to discontinue the passway.

**R. B. DOHONEY FOR APPELLANT.**

The long continued use of the passway by appellant, and those under whom he claims, creates the presumption that the use was adverse, and it was not necessary to show, by positive testimony, that the appellant had claimed this use as a matter of right, and so proclaimed to his neighbors. (*O'Daniel v. O'Daniel*, 88 Ky., 189; *Butt v. Napier*, 14 Bush, 89; *Hall v. McLeod*, 2 Met., 98.)

*Bowman v. Wickliffe*, 15 B. M., 99, distinguished.

**LEWIS McQUOWN, J. W. COMPTON, A. W. SCOTT FOR APPELLEE.**

There was only the mere use of the passway in question over the unclosed woodland of appellee, without any claim of right, and the usage and custom of the country conclusively rebuts any presumption of a dedication. (*Bowman v. Wickliffe*, 15 B. M. 84; *Hall v. McLeod*, 2 Met., 98; *Wilkins v. Barnes, &c.*, 79 Ky., 323; 1 *Addison on Torts*, 136.)

*O'Daniel v. O'Daniel*, 88 Ky., 189, distinguished.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

Appellant brought this action for judgment compelling appellee to remove fences recently built across a passway, and enjoining him thereafter obstructing it.

It appears that appellee owns and occupies a tract of land, the north and south lines of which are parallel; the former for about half its length bordering on a public road, the latter being north boundary of a tract of land appellant owns and resides on. The passway in question extends northward, though not in a straight line, to the public road dividing the land of appellee in two about equal parts. Appellant owns and cultivates another tract north of and

binding on the public road mentioned, to reach which from his home place the passway is the nearest and most direct route. He has no outlet at all from his residence except on lands of others; though he might have a way to a public road by going a greater distance upon his own land and less upon land of another than is the case of the passway in dispute.

It does not appear the lands of the two parties ever belonged to the same owner, consequently appellant does not claim the right of way as a necessary incident of the grant of the land by his vendor. Nor does he contend the easement exists in virtue of an express contract. But he bases his claim upon un interrupted use and enjoyment by himself and his vendors, so long as to establish his right to the passway.

The enjoyment of an incorporeal hereditament for as much as fifteen years creates a presumption of legal title. But in such case the time of enjoyment is used merely as evidence to raise the presumption of a grant; and the manner of the enjoyment, whether by mere *favor* or under a claim of *right*, may be used as evidence to rebut the presumption. (Hall v. McLeod, 2 Met., 98.) "To create the presumption of the grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right,

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and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owners of the soil." (Bowman v. Wickliffe, 15 B. M., 98.)

The evidence shows that for many years, according to some of the witnesses as much as forty or fifty, there were several passways over the land of appellee used by the neighbors generally, at least two of them running in the same general direction as the one in question, and one or two in different direction. But they were discontinued from time to time, as the owner cleared and inclosed his land for cultivation, without question of his right to do so. And the one in question was in the same way stopped by fences erected to inclose woodland hitherto uninclosed. No witness testifies he or any other person ever claimed the right to use either the passways that had been previously fenced up or the one now in dispute. Nor does appellant state he ever claimed the right to use it adversely until this action was commenced. The uncleared and uninclosed condition of the land where the passway is located, the recognized right of the owner to change and to discontinue at will the different passways over his land, and the customary and free use of passways through appellee's woodland, make it evident no person ever treated or regarded his use of the passway in dispute as any thing more than a permissive use which the owner might revoke at any time.

The case of Bowman v. Wickliffe is very much like this, and there the court used this language, which is applicable here: "It has been usual and customary in this State to travel over uninclosed woodland with-

out asking permission of the owner; and considering the extent and universality of this custom, it tends strongly, if not conclusively, to repel any presumption that might otherwise arise, in such a case, from long continued use of the grant of the right of way by the proprietor of the land. The mere use of this road, then, during the period of time that the land through which it passed was uninclosed woodland, can not be regarded as proving any thing detrimental to the rights of the proprietors of the land."

In this case, the effect of keeping the alleged pass-way open is to divide appellee's land into two parts, necessitating additional fencing or erection of gates, in order that appellant may exercise as a right what heretofore he never was authorized or justified in regarding as more than a favor that appellee could at any time withhold.

The case of *O'Daniel v. O'Daniel*, 88 Ky., 185, cited by counsel, is in the character and location of the passway, the relative attitude of the two land-owners and situation of their tracts, entirely unlike this, because there the passway had not only been practically upon the same ground for many years, but the circumstances of its locality and constant and necessary use made it evident that it had been used adversely and under a claim of right; and the difference between that case and *Bowman v. Wickliffe*, which, in all essential particulars, is like this, was there recognized, this language being used: "In that case (*Bowman v. Wickliffe*) the passway was through uninclosed woodland, and in this same woods divers other passways ran that had been changed and stopped from time to



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time by the owner at his pleasure." And besides, said the court, the use of the passway was at no time, until within a few years, claimed as a right, but regarded as a privilege allowed by the owner, which he might withdraw at pleasure.

It does not seem to us that the use of a way by one person over the land of another, under circumstances showing it so conclusively, as is done in this case, to be exercised merely permissively and as a favor, however long time it may exist, can ever become a right. For as said in Hall v. McLeod: "It can not be admitted that where the proprietor of land has a passway through it for his own use, that the *mere permissive use* of it by other persons for a half century would confer upon them any right of enjoyment. So long as its use is merely permissive, it confers no right; but the proprietor can prohibit its use and discontinue it altogether. A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man by allowing his neighbor to pass through his farm without objection over the passway which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue."

Judgment affirmed.

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Brandts' Ex'r v. Donnelly.

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CASE 17—PETITION ORDINARY—FEBRUARY 25.

**Brandts' Ex'r v. Donnelly.**

APPEAL FROM KENTON CIRCUIT COURT.

1. WHERE A SURETY IN THE BOND OF A PERSONAL REPRESENTATIVE PROCURES THE EXECUTION OF A NEW BOND, pursuant to sections 1 and 6 of chapter 104, General Statutes, containing a stipulation indemnifying him against "any loss, cost or damage legally incurred by reason of said suretyship," if judgment is obtained against him upon the old bond, and he, in good faith, prosecutes an appeal from the judgment, the indemnitor is liable to him for the legal or court costs incurred upon the appeal, and also the damages upon affirmation of the judgment. But unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, the extraordinary costs of the appeal, such as attorneys' fees, are not chargeable to him.
2. SAME.—In an action against the indemnitor upon the bond executed by him, it is no defense that the principal appeared and executed the bond without notice having been served on him.

## CLEARY &amp; HAMILTON FOR APPELLANT.

1. The county courts are courts of limited jurisdiction, and derive all their powers from express statutory enactments. (*Gilchrist v. Bartlett*, 9 Bush, 49.)

There is no jurisdiction in the county court under section 1 of chapter 104, General Statutes, unless the steps required by that statute are taken. The jurisdiction can not be acquired by consent.

2. Donnelly was bound on his bond of 1876. It does not appear when the abstraction of the moneys took place, but it was before the 27th of June, 1879, and if the indemnity was not then had in accordance with the provisions of the statute, the stipulation was without consideration, and could not be enforced as a common law obligation.
3. The denial of appellee's right to recover attorneys' fees, costs and cost of supersedeas on judgment since its date of September, 1888, was proper. It was Donnelly's duty to have stopped with the judgment of September, 1888. (87 Ky., 259; 18 Ky. Law Rep., 82.)

## HALLAM &amp; MYERS FOR APPELLEE.

1. The failure to give notice was immaterial. The principal had the right to waive it and enter his appearance.

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2. An executor may be sued even after he has finally distributed the estate. (*Baldwin v. Shine*, 84 Ky., 502.)
3. Brandts' obligation was to pay not merely the principal, but also interest, costs, lawyers' fees and other expenses, including the costs of appeal. Brandts or his representative ought to have notified Donnelly not to appeal if they did not desire him to carry further his desperate fight for their benefit.
4. Donnelly did not pay any thing until June 21, 1891, and, therefore, never had a cause of action until then.

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Section 1 of chapter 104 of the General Statutes provides that if a surety on the bond of a personal representative wishes to be relieved from future liability, and to obtain indemnity for such as may have been incurred, or either, he may, by notice, require the principal obligor to appear before the court in which the original bond was given, and if a new bond (see section 6, same chapter) is given, it shall operate a discharge of the surety from all liability for the acts of the principal thereafter done; and if the object be so specified, the bond shall contain a stipulation or covenant to indemnify the surety against any loss, cost or damage legally incurred by reason of said suretyship.

In the Kenton County Court, on the 27th of June, 1879, E. H. Brandts, the intestate of the appellant, executed bond as surety of one L. J. Blakely, administrator of John Pepper, deceased, covenanting in the usual form that Blakely should well and truly administer the goods, &c., of Pepper, and further covenanting to indemnify Charles Donnelly, now the appellee, and who was the former surety of said Blakeley as administrator of said Pepper, against any loss, cost or damage legally incurred by reason of his suretyship.

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Brandts' Ex'r v. Donnelly.

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It appears that prior to the execution of this bond, there had come to the hands of Blakely, of the estate of Pepper, some four thousand dollars, to provide against the possible payment of which by himself, Donnelly had taken the proper steps to obtain the indemnifying bond of Brandts of June, 1879, as provided for under the sections of the statute, *supra*.

Thereafter, in March, 1881, William Pepper, sole distributee of John Pepper, instituted his action against Brandts and against Donnelly, on their respective bonds, to recover the amount alleged to be in Blakely's hands, or wasted by him, coming to said distributee. Pending the action, various payments were made on the demand—possibly by Brandts—who, however, died in 1885, and the action was thereupon discontinued as to him.

In September, 1888, Pepper recovered judgment against Donnelly, who then appealed to this court, where, in March, 1891, the judgment was affirmed. The amount of it, including the debt, interest and costs up to July 21, 1891, was three thousand and ten dollars and thirty cents. To recover which, and also the sum of two hundred and thirty dollars and forty-five cents paid his attorneys in his defense of said suit, and also twenty dollars, the cost of printing a brief in the Court of Appeals, the appellee brought this action against the executor of Brandts. His petition sets out in detail the foregoing facts. The appellant, as such executor, filed his answer in some seven paragraphs, to each of which a general demurrer was sustained. He tendered an amended answer which was rejected, and declining to plead further, judgment was ren-

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dered against him *de bonis testatoris*, and from this he appeals.

By his first paragraph he denies that Donnelly caused a written notice to be served on Blakely to appear and execute the bond of June, 1879, and his counsel insist that thereby the county court of Kenton, by reason of its being a court of limited jurisdiction, could not accept the bond voluntarily executed by Brandts. He denies that Blakely and Brandts executed and acknowledged such bond "*pursuant to such notice*," or that such bond was "*duly*" accepted. In another paragraph he alleges that the bond in question was signed in the clerk's office and not in the court-house, and that the *judge* made no order allowing said bond to be executed.

The statute of limitation is also pleaded in another paragraph, although Donnelly's damnification had occurred only a few months before the institution of the action. The annihilation of the trust is set up, based on the alleged final distribution of the assets in the executor's hands.

That these averments are wholly insufficient to support a defense is manifest, and without burdening the record with details, it is sufficient to say that nowhere in the answer or amended answer is there to be found a statement of fact sufficient to constitute or support a defense, unless in the fifth paragraph of the original answer as amended. There the defendant denies that the plaintiff is entitled to be reimbursed for expenditures in the way of interest, costs, lawyers' fees, or any other expenses paid or incurred since the judgment in the Pepper case of

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September 21, 1888; and he alleges that, embraced in the sum sued for, are the sums of two hundred and thirty dollars and forty-five cents for attorneys' fees; twenty dollars for printing brief; two hundred and twenty-nine dollars and ninety cents, ten per cent. damages on supersedeas; one hundred and twenty dollars for officers' fees and costs—all incurred after the judgment of September, 1888, and incurred by reason of the alleged unnecessary appeal of said Donnelly.

These denials and statements, we think, are sufficient to raise the legal question as to whether these extraordinary costs can be recovered of the indemnitor on the bond of June, 1879.

It seems certain enough that the legal or court costs, including the damages on affirmance of the judgment in the appellate court, are embraced expressly in the language of the bond. These costs and damages are the precise liabilities against paying which the indemnitee provided by obtaining this bond. This cost and expense the appellant could have stopped at any time by paying the debt his intestate had bound himself to pay, or even by notifying the appellee not to prosecute the appeal unless at his own expense. The general rule seems to be that in cases of this kind all such cost may be recovered when nothing appears to indicate bad faith in making the defense, and in this way incurring cost. But the general rule seems otherwise when it comes to extraordinary costs, such as attorneys' fees, &c.; and certainly in the absence of a showing that these fees were incurred for the benefit or attempted benefit of Brandts' estate, or at the instance of his ex-

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Brandts' Ex'r v. Donnelly.

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ecutor, the appellant should not be held bound for them. The appellee could have stopped, and that, too, with a consciousness of having done all he could to prevent recovery, upon the rendition of the judgment in September, 1888. The action had been instituted in March, 1881, and more than seven years had elapsed before the judgment was obtained. The appeal may have been taken solely or mainly to benefit Donnelly. It may have been done without any reasonable or probable expectation of success, and may not have been on the merits of the case, but with the knowledge that its prosecution could not in anywise result beneficially to the estate of Brandts. In such cases it would seem that unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, such extraordinary costs are not chargeable to him.

Therefore, solely for the reason that it allows these two items of two hundred and thirty dollars and forty-five cents and twenty dollars, the judgment of the lower court is reversed, with directions to enter judgment in accordance with this opinion.

## CASE 18—PETITION EQUITY—MARCH 2.

## Garner, &amp;c., v. Jones, &amp;c.

## APPEAL FROM CLARK CIRCUIT COURT.

1. COUNTER-CLAIM.—In an action to settle a partnership in the business of operating a mill, the defendants had the right to plead as a counter-claim their cause of action against plaintiffs for breach of warranty in the sale to them of one-third the mill.
2. UNLIQUIDATED DAMAGES CAN NOT BE PLEADED AS A SET-OFF unless the plaintiff is non-resident or insolvent. It is not sufficient to authorize such a set-off that one of several plaintiffs is a non-resident, there being nothing to show that the other plaintiffs are either non-resident or insolvent.

## GEO. B. NELSON FOR APPELLANTS.

The fact that one of the plaintiffs is a non-resident does not bring the defendants' claim for unliquidated damages within the rules of equitable set-off, there being nothing to show that either of the other plaintiffs is a non-resident or insolvent. (*Shropshire v. Conrad*, 2 Met., 144; *Forbes v. Cooper*, 10 Ky. Law Rep., 865; s. c., 88 Ky., 285; *Patrick v. Langston* 2 J. J. Mar., 655; *Markham v. Todd*, 2 J. J. Mar., 865; *Turpin v. Turpin*, 7 J. J. Mar., 87; *Beall v. Squires*, 8 Mon., 376; *Chamberlain v. Stewart*, 6 Dana, 88; *Taylor v. Stowell*, 2 Met., 158.)

## L. H. JONES FOR APPELLEES.

The fact that one of the plaintiffs is a non-resident impairs, if it does not defeat, the efficacy of the legal remedy, and therefore affords sufficient reason in equity for allowing the claim for unliquidated damages to be pleaded as a set-off. (*Forbes & Bro. v. Cooper & Co.* 88 Ky., 285; *Taylor & Son v. Stowell*, 4 Met., 175.)

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action to settle a partnership in the business of operating a blue grass seed-cleaning mill for the year 1886, of which the firm of Garner & Bro., owning one-third interest, H. C. Foster owning one-third, and H. & T. B. Jones jointly owning one-third, were members.



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Garner, &c., v. Jones, &c.

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It appears that H. & T. B. Jones, defendants to the action, had management and control of the business, and in the petition it is alleged they are indebted to the firm by reason of their failure to charge themselves with and account for a large amount of seed cleaned which they owned individually, and because they charged the firm with a larger amount for operating expenses than necessary.

The defendants controverted the alleged indebtedness, and also asked judgment over for damages, on account of alleged breach of warranty on part of the plaintiffs, original owners of the mill, in sale of one-third interest thereof to defendants, and also on account of a large amount of seed belonging to defendants having been, in the year 1885, before they purchased an interest in the mill, so defectively and improperly cleaned as to greatly injure sale of the seed.

The action was referred to a special commissioner, who, after taking a large amount of proof, reported that plaintiffs had not made out any cause of action against the defendants, and the latter had likewise failed to show a right to recover damages on account of either the alleged breach of warranty, pleaded as counter-claim, or injury done to the seed by defective and improper cleaning in 1885, which was pleaded as a set-off. Exceptions to the commissioner's report were filed by both parties, but all were overruled and the report confirmed by the court, except that it was adjudged the defendants recover on their set-off the sum of five hundred and forty dollars and fourteen cents damages for failure of plaintiffs to properly,

and according to contract, clean the seed in 1885. From that judgment the plaintiffs have appealed, and defendants have entered a cross-appeal.

We see no reason for disturbing the finding of facts by the special commissioner, particularly as it was confirmed by the chancellor. Nor does counsel on either side show sufficient reason for disturbing it. Consequently the only question we need consider is, whether the demurrer to the paragraph in which defendants pleaded the set-off was properly overruled; and thus arises the question whether, in an action in equity, unliquidated damages can, under the Civil Code, be pleaded as a set-off.

The cause of action for breach of warranty in sale of one-third the mill by plaintiffs to defendants was connected with the subject of the original action, and therefore the defendants had the unconditional right under the Code to plead it as a counter-claim, though it was not, as before stated, sustained by the proof. But it has been fully settled by this court that a demand for unliquidated damages is not the proper subject of a set-off under the Civil Code when there is an adequate remedy at law not prevented by the fact of insolvency or non-residence of the plaintiff. (*Shropshire v. Conrad*, 2 Met., 143; *Forbes & Bro. v. Cooper & Co.*, 88 Ky., 285.)

In this case one of the plaintiffs, Foster, is shown to be non-resident of the State, but Garner & Bro. are not alleged or shown to be either non-resident or insolvent. It would, therefore, seem that the defendants still have an adequate remedy by separate action for the cause pleaded in his set-off, and consequently

## Board of Trustees of Elkton v. Gill.

no reason exists here for making an exception to the general rule denying the right to plead as a set-off unliquidated damages. It thus follows the demurrer to that paragraph of the answer containing the set-off for damages on account of a transaction prior to and not connected with the subject of plaintiffs' action, ought to have been sustained. But while such ruling of the lower court would have prevented any recovery on the set-off, it would not have concluded defendants' right to maintain a new and distinct action for the same cause.

Wherefore, the judgment on the appeal is reversed, and cause remanded for proceedings consistent with this opinion; but, for reasons already stated, it is affirmed on the cross-appeal.

## CASE 19—PETITION EQUITY—MARCH 4.

## Board of Trustees of Elkton v. Gill.

## APPEAL FROM TODD CIRCUIT COURT.

1. AN ACT OF THE LEGISLATURE EXTENDING THE LIMITS OF A TOWN OR CITY WILL NOT BE DECLARED UNCONSTITUTIONAL upon the ground that property thus subjected to municipal taxation derives no benefit from the town or city government, unless it appears that the imposition of the tax amounts to the taking of private property without just compensation.
2. MUNICIPAL TAXATION.—Whether the benefit and advantages derived from a municipal government are in a given case *adequate* compensation for local taxation imposed is not the province of courts to decide, legislative determination of that matter being conclusive.

In this action to enjoin the collection of town taxes imposed upon plaintiff's residence and lawn, it appears that the tract of land upon which plaintiff resides contains forty-six acres, which is used for farm-

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98	594
94	138
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ing purposes, but the area included in the town limits by the act, the validity of which is questioned here, and which is the land sought to be taxed, does not much exceed six acres. There is a street, improved and kept in repair by the town, on each side and adjacent to plaintiff's land and extending beyond his residence. There is another street connecting these two, and extending along the front of his lawn. There is a sidewalk made by the town by which he can go from his gate to the central part of the town. Opposite his lawn is a church building and several dwelling-houses. He has sold off his land several lots at the rate of three hundred dollars per acre, that for farming purposes could not have been sold for more than thirty dollars per acre; and on one street there are no vacant building lots between a point beyond plaintiff's dwelling-house and the court-house square. The plaintiff is a minister of the gospel, and preaches in one of the town churches. *Held*—That there is no reason for exempting plaintiff's residence and lawn from municipal taxation.

**BEN T. PERKINS, JR., AND EDWARD W. HINES FOR APPELLANT.**

1. To authorize the court to declare a municipal tax invalid upon the ground that the Legislature ought not to have included the property sought to be taxed within the boundary of the town, the case must be one "in which the operation of the power will be, *at first blush*, pronounced to be the taking of private property without compensation." (*Sharp's Ex'r v. Dunavan*, 17 B. M., 228; *Matthus v. Shields*, 2 Met., 558.)
2. The charter exemption is of all lands used *exclusively* for farming purposes, and, therefore, does not include plaintiff's residence and home.

**H. G. PETRIE FOR APPELLEE.**

1. By the express terms of the act, by virtue of which the right to tax is claimed, the appellee's farming land and stock are exempt from taxation for the benefit of the town. (Acts 1883-84, vol. 2, p. 109.)
2. Even if appellee's land is not exempt by the terms of the act, it would be unconstitutional to subject his land to municipal taxation under the facts of this case, as it would be the taking of private property for public use, without consent and without compensation. (*City of Covington v. Southgate*, 15 B. M., 498; *Cheany v. Hooser*, 9 B. M., 845.)

**WM. H. HOLT ON SAME SIDE IN PETITION FOR REHEARING.**

By the *very terms* of the act the property of the appellee was exempt from municipal taxation. (Acts 1883-84, vol. 2, page 126.)

The finding of the lower court that the land is used exclusively for farming purposes, and therefore within the exemption, will not be

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undisturbed unless *palpably* against the weight of the evidence. (Henderson's Ass'ee v. City of Louisville, 4 Ky. Law Rep., 487; Campbell v. Cincinnati So. R. Co., 9 Ky. Law Rep., 799.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1884 the General Assembly passed an act extending corporate limits of the town of Elkton so as to include, besides property of others, the residence of appellee Gill, and incidentally land used as a lawn and grass lot, lying between the new and old boundary lines. And the tax-collector having, upon refusal of appellee to pay municipal taxes assessed against him for the year 1889, levied on and advertised sale of property to satisfy amount thereof, this action was brought for an injunction restraining such sale, which was granted temporarily, and by the judgment appealed from perpetuated, upon the ground of unconstitutionality of the act.

The general power of the Legislature to extend the limits of a city or town, whereby municipal taxation is imposed upon property hitherto free of it, can not, in view of repeated decisions of this court, be now disputed. And it is only when that power is so exercised as to involve violation of the clause of the Constitution prohibiting taking of private property for public use without just compensation, courts will interpose. But the protection afforded to, and advantages received by, the citizen from a municipal government are, in meaning of the Constitution, just compensation for taxation imposed in order to maintain it. And local taxation authorized by law can not be deemed taking private property without just compensation, unless it is palpable that persons, or

their property, are subjected to such burthen for benefit of others for purposes in which they have no interest and to which they are, therefore, not justly bound to contribute. (*Cheany v. Hooser*, 9 B. M., 330; *Matthus v. Shields*, 2 Met., 553.) Whether the benefit and advantages derived from a municipal government are, in a given case, adequate compensation for local taxation imposed, is not the province of courts to decide, legislative determination of that matter being conclusive. (*Cheany v. Hooser*; *Swift v. City of Newport*, 9 Bush, 39.) For, as said in the first-named case, the limit of legislative discretion in regard thereto "can only consist in the discrimination to be made between what may, with reasonable plausibility, be called a tax, and for which it may be assumed that the objects of the taxation are regarded by the Legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or in some other form, the taking of private property without just compensation."

Tested by the rule so clearly and firmly fixed by this court, it seems to us there can be no doubt of the validity of the act in question, and consequent liability of appellee for the tax imposed upon him. He states that the quantity of land upon which he resides is forty-six acres, and that it is used for farming purposes; but the area of that part included within the town limits, fixed by the act of 1884, whereon is his residence, does not, according to the plat filed, appear to much exceed six acres. There is a street improved and kept in repair by the municipi-

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Board of Trustees of Elkton v. Gill.

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pality on each side of and adjacent to his land, and extending beyond his residence. There is another street, lately opened, called Academy street, connecting these two, and extending along the front of his lawn, by which he has access to the railroad depot, and also to the court-house. There is still another, called Allen street, between the two first named, that intersects Academy street, and terminates opposite appellee's lawn or yard-gate, two hundred and fifteen yards from his dwelling-house. Along Allen street there has been made, at expense of the municipal government, a sidewalk, by which he can go from his gate to the central part of the town. There is a female academy situated apparently upon the same block of land that his dwelling-house stands, and not far from it. Opposite to his lawn is a church building, two factories and several dwelling-houses. He has sold off his land several lots, at the rate of three hundred dollars per acre, that for farming purposes could not have been sold at the rate of more than thirty dollars per acre. Upon those lots dwelling-houses have been erected, apparently farther from the public or court-house square than he resides, and upon the farthest out of those lots resides a member of the board of trustees. He is a minister of the Gospel, and preaches in one of the town churches. He also has five or six teachers in the town schools boarding with him. It further appears that population has increased in the last five years in the vicinity of his land, and that there is no vacant building lot on one of the streets mentioned between a point even farther out than his dwelling-house and

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Shake v. Frazier.

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the court-house square. No street has been opened through his land, nor does it appear to be the present purpose of the board of trustees to open any. But that fact does not at all affect the question, whether he, by reason of the relative situation and location of his residence, derives protection and benefits in common with other tax-payers from the municipal government. And especially is it immaterial, in view of the existence of streets already constructed at expense of other tax-payers, that afford him outlet and convenient way in almost any direction he may wish to go. It is difficult to conceive wherein the act in question is obnoxious to the clause of the Constitution referred to as heretofore construed and applied by this court, or upon what just or reasonable ground appellee can be exempted from the taxation imposed.

The judgment is reversed, and cause remanded for dissolution of the injunction and dismissal of the action.

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CASE 20—APPEAL TO CIRCUIT COURT—MARCH 4.

## Shake v. Frazier.

## APPEAL FROM UNION CIRCUIT COURT.

**EMINENT DOMAIN—OPENING OF PRIVATE PASSWAY.**—Section 1 of article 2, chapter 94, General Statutes, is unconstitutional in so far as it authorizes the opening of a private passway for the mere purpose of enabling a citizen to pass from a tract of land upon which he resides to another tract owned by him, upon which no one resides, the opening of such a passway not being necessary to enable him to attend to his public duties. Nor is the citizen entitled to such a passway by

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reason of the fact that it is necessary to afford him an outlet to market or to his county-seat from the tract upon which he does not reside, he having such an outlet from the tract upon which he does reside.

WM. LINDSAY FOR APPELLANT.

The Legislature has no power to authorize the private property of one person to be taken for the use of another private person with or without compensation. (Robinson v. Swope, 12 Bush, 21; Mills on Eminent Domain, sec. 22; Cooley on Const. Limit., sec. 581.)

SAM C. HUGHES OF COUNSEL ON SAME SIDE.

D. W. LINDSEY, H. D. ALLEN FOR APPELLEE.

A land-owner has the right to an outlet from his land, although he may not reside upon it; and the Legislature may, in the exercise of eminent domain, authorize the establishment of a passway over the land of another in order to provide such an outlet. (Robinson v. Swope, 12 Bush, 21.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The property of the citizen may be taken by the sovereign power for a public use upon compensation being first made, and this is called *eminent* domain; but the taking of the private property of one for the private use of another, however necessary it may be for the use and enjoyment of the person to whom the right of property is transferred, has invariably been held unconstitutional. Statutes authorizing the creation of private passways over one's land for the benefit of another have been sustained, for the reason the public is directly interested in their establishment to enable the citizen to discharge the duties he owes the State. When summoned as a witness or juror he is entitled to a way out from his premises that he may obey the demands of the public upon him; and also as said in Robinson v. Swope, 12 Bush, 21, the public has an interest in his

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Shake v. Frazier.

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attendance at elections, "places of public worship, and that he shall be provided a way to market that he may buy and sell, so as to provide himself with those things without which he could not discharge his civil and social duties." The statute of this State in regard to passways provides, among other things, that a passway may be established to enable the applicant to pass from *one tract of land to another owned by him*, and this part of the statute was held, in the case cited, to be unconstitutional, for the reason that it was taking the private property of one for the mere convenience of another. The appellee is attempting to avoid the effect of that decision by showing that the outlet is necessary to enable him to get to his county seat, or to his mill, or to some other public place, when it appears there is no one living on this tract of land, and no reason for taking appellant's property and giving it to the use of the appellee, except as a matter of great convenience to the latter.

The appellee is living on another tract of land where there is every facility afforded him for going to his county seat and other public places in the discharge of either his public or private duties. Besides, he has a passway equally as convenient, under, it is true, a mere permissive use, enabling him to go to and from this tract, and if he is permitted to show that he wants an outlet from this separate tract to get to his mill or county seat, when there is neither dwelling or tenant upon it, then no case could well arise where the right to make his neighbor's land subservient to his own use could be withheld. Mr.

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Mills, in his work on Eminent Domain, says: "The use to which property is condemned must be public. As between individuals, no necessity, however great, no emergency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offer of compensation, however extravagant, can compel or require a man to part with one inch of his estate." (Section 22.)

The Legislature is without power to take appellant's land for the use of the appellee. No one resides on the tract from which the proposed passway is to run, and therefore the public has no interest in the convenience it will afford the appellee in hauling his produce or in reaching this land from the tract upon which he resides. Courts can not be too careful in determining the extent to which private property may be taken for the benefit of another, even when clothed with a public interest; and however great the inconvenience resulting to the applicant in refusing this right, it seems to us it would be a palpable violation of the constitutional rights of the appellant to make his land subserve the use of the appellee, however great the compensation tendered.

Judgment reversed, and remanded with directions to dismiss the proceedings at the cost of the appellee.

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Newman v. Moore.

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CASE 21—PETITION EQUITY—MARCH 9.

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## Newman v. Moore.

APPEAL FROM PENDLETON CIRCUIT COURT.

1. A MARRIED WOMAN WILL BE ESTOPPED from pleading her inability to contract in bar of the consequences of her own fraud.
2. WHERE A MARRIED WOMAN REPUDIATES HER CONTRACT FOR THE SALE OF LAND, the land may be subjected to the payment of the sums paid by the purchaser on the purchase price, and if the vendor has transferred the notes for deferred payments, the assignee of the notes may subject the land to pay what he paid for the notes, but not for their full face value, unless he paid that for them, the measure of recovery being the extent to which he is actually injured or damaged.
3. APPEARANCE.—The defendant to a cross-petition, having combated the claim set up in that pleading by filing exceptions to the commissioner's report, can not now object to the judgment upon the ground that she was not summoned on the cross-petition, as she is to be regarded as having entered her appearance.

R. W. HOLLAND, J. T. SIMON FOR APPELLANT.

Where a married woman refuses to perform her contract for the sale of land, one to whom she has assigned the purchase money notes is entitled to a lien on the land therefor.

JNO. H. BARKER FOR APPELLEE LOWE.

As the allegations of the cross-petition are all denied in the reply, and appellant offered no evidence whatever in the case, the judgment of the chancellor was proper.

LESLIE T. APPLGATE FOR APPELLEES J. H. AND HALLIE MOORE.

The Moores were not made parties to appellant's cross-action, and, therefore, he can not complain of the judgment below so far as it affects them.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

While a contract between a married woman and another may not be enforced specifically, yet, not even a married woman may so conduct herself as to defraud another and escape responsibility, if, in the nature of things, reparation can be made.

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Newman v. Moore.

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She will not be allowed to take advantage of her own wrong, and will be estopped from interposing her inability to contract, in bar of the consequences of her own fraud.

In this case Mrs. Moore, in conjunction with her husband, sold and covenanted to convey her land to I. C. Lowe. She received two hundred and fifty dollars of the purchase money, accepted and sold the notes for the remaining purchase price of her land; she put the purchaser in possession, and then refused to convey.

Upon this state of case her land—the subject-matter of her attempted contract—may be subjected to the payment of the sums paid by Lowe, the purchaser. Also to the sum paid by Newman for the notes on Lowe, who refuses to pay them only because he can get no title to the land.

It is contended by Newman that he should recover the full face value of the notes, and so should he if he paid that for them. The measure of recovery is the extent to which he is actually injured or damaged. He must be made whole—reimbursed to the extent of his loss. Mrs. Moore's liability arises, not by reason of the contract of assignment and sale of the notes, but out of the equity fixing her responsibility at a price equal to that expended by the victim of her fraud. Any other criterion of damage would amount to the specific enforcement of a void contract.

She insists, however, that she was not summoned on the cross-petition of Newman, and that he is therefore not entitled to any relief against her. But she filed

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Newman v. Moore.

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exceptions in open court to the commissioner's report, fixing the amount coming to Newman, which were sustained by the court, and as she thus took part in the trial, and by her exceptions combated the claim set up in Newman's action, she can not be allowed to say that she was not in court. She can not appear in court and attempt to defeat the purpose sought to be effected by the cross-petition, and yet shelter herself behind the plea that she has not been summoned. We think she thereby entered her appearance.

The judgment below fixing the amount due Lowe need not be disturbed, save in so far as the accumulation of rents, if any, on the one side, and of interest on the other, may be taken into the account; but to the extent that Newman is denied relief it is erroneous. The issues attempted to be raised by the reply of Lowe are, so far as he is concerned, wholly immaterial, but on a return of the case, if Mrs. Moore desires to plead further she may be allowed to do so, the object of further investigation being the ascertainment of Newman's actual loss growing out of his purchase of the Lowe notes.

Wherefore, the judgment below is reversed, with directions to allow the case to proceed in accordance with the principles herein announced.

Baughman, &c., v. Louisville, &c., Railroad Co.

CASE 22—PETITION ORDINARY—MARCH 9.

## Baughman, &c., v. Louisville, &c., Railroad Co.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **JOINDER OF PLAINTIFFS.**—Where a contract for the shipment of horses owned by different persons was made with the carrier by one person acting as the agent of the several owners, each owner had a separate right of action for the damages suffered by him by breach of the contract, and if all had united in one action the defendant would have had cause of demurrer; therefore, the defendant had no right, after separate actions were brought, to demand that they be consolidated.
2. **CARRIERS—CONTRACT LIMITING LIABILITY.**—A common carrier can not contract for exemption from the consequences of his own negligence or that of his servants; nor will the courts give effect to a stipulation in a contract for the shipment of goods exempting the carrier from paying their full value in the event they are lost or destroyed by his negligence, although the stipulation be in the form of an agreement as to the value of the goods.

In this case, in which the court refuses to give effect to such a stipulation in a contract for the shipment of a horse, it is not alleged that plaintiffs or their agent deceived defendant as to the value of the horse, nor was the rate of freight lowered in consideration of the stipulation as to value.

**MUIR, HEYMAN & MUIR, E. F. TRABUE FOR APPELLANTS.**

1. The action of the court in refusing to consolidate the actions can not be reviewed, as appellee does not pray a cross-appeal. But the decision of the court upon this question is undoubtedly correct. Persons severally interested can not join, and even if these actions had been joined they might have been separated on motion. (Civil Code, sec. 88.)
2. Even if appellee had succeeded in consolidating the actions, the motion to remove to the Federal Court must still have failed, as the amounts could not be added to give jurisdiction. (Henderson v. Wadsworth, 115 U. S., 204; Stewart v. Dunham, 115 U. S., 329; Gibson v. Shufeldt, 122 U. S., 27.)
3. A common carrier can not, by contract, limit its liability for negligence. And while the parties may, in advance, liquidate the damages recoverable in case of loss, yet in doing so they must have reference to the *truth*. The insertion in the contract of an arbitrary value, with the declaration that it is agreed to be the real value, is not binding. (Adams Express Co. v. Knott, 2 Duv., 563; K. C., St. J. & C. & C. B. R. Co. v. Simpson, 30 Kan., 651; Moulton, &c. v. R'y

**Baughman, &c., v. Louisville, &c., Railroad Co.**

Co., 31 Minn., 85; Orndorff v. Express Co., 3 Bush, 194; Southern Express Co. v. Gutman, 6 Ky. Law Rep., 587; Cincinnati, &c., R. Co. v. Grover, 11 Ky. Law Rep., 236; Pa. R. Co. v. Weiler, 134 Pa. St., 310; Pa. R. Co. v. Riaordon, 119 Pa. St., 577; Southern Express Co. v. Seide, 67 Miss., 609; R'y Co. v. Hugert, 90 Ala., 39; U. S. Express Co. v. Backman, 28 Ohio St., 144; L. & N. R. Co. v. Wynne, 88 Tenn., 320; Southern Pac. R'y Co. v. R. E. Maddox & Co., 75 Texas, 300; Hahn v. Tausman, 12 Bush, 249.)

The cases of concealment of the real nature of the thing transported stand on a different principle.

**HUMPHREY & DAVIE FOR APPELLEE.**

1. The plaintiffs having represented and agreed that the goods are of a specified value, and thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value. (Hill v. Boston, &c., R. Co., 144 Mass., 284; Graves v. Lake Shore, &c., R. Co., 137 Mass., 33; Magnin v. Dinsmore, 62 N. Y., 35; s. c., 20 Am. Rep., 442; Rosenfield v. P. D. & E. R. Co., 103 Ind., 124; Richmond, &c., R. Co. v. Payne, 86 Va., 481; Hart v. Pa. Co., 112 U. S., 336; St. Louis R. Co. v. Weakly, 50 Ark., 397; Louisville & Nashville R. Co. v. Sherrard, 4 Southern Rep. (Ala.), 29; Harvey v. Terre Haute R. Co., 74 Mo., 538; Louisville & Nashville R. Co. v. Lowell, 15 S. W. Rep., 537; Duntley v. Boston & Maine R. Co., 20 Atl., 327.)

There is no case in Kentucky holding that such a contract is not valid. (Louisville & Nashville R. Co. v. Brownlee, 14 Bush, 600; Hoeing v. Adams Express Co., 8 Ky. Law Rep., 154; Adams Express Co. v. Hoeing, 9 Ky. Law Rep., 814.)

2. If this case is remanded it should be with a direction to consolidate the actions and transfer them to the Federal court.

Cases will be consolidated where they involve a litigation between the same parties in causes of action, all of which might be united into one suit. (Cecil v. Briggs, 2 Term Rep., 639; Veile v. Germania Ins. Co., 26 Iowa, 9; s. c., 96 Am. Dec., 88; Dent v. Kendall, 9 N. J. Law, 835; Logan v. Mechanics' Bank, 13 Ga., 201; Tartley v. Colport, 65 Ga., 259.)

When the actions are thus consolidated they become one action. (Castro v. Whitlock, 15 Texas, 439.)

The plaintiffs were united in interest, and should have joined in a single suit. Where there is a promise to two or more persons to perform one single duty all must sue. (Civil Code, section 24; Weinstein v. Bellwood, 12 Bush, 140; Birch v. Poynter, 1 B. M., 65; 1 Parsons on Contracts, p. 13; Angus v. Robinson, 8 Atl. Rep., 499; Farrington v. Payne, 15 John., 432; Brandenburg v. I. P. & C. R. Co., 13 Ind., 103; Olcott v. Hugus, 105 Pa. St., 354; Wright v. Baldwin, 18 N. Y.)



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Baughman, &c., v. Louisville, &c., Railroad Co.

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## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in an action by Baughman & Lasley, against Louisville, Evansville and St. Louis Railroad Company, that was tried at the same time and together with three others against the same defendant.

It is stated substantially by plaintiffs that they delivered to defendant, to be shipped on its road from Louisville to St. Louis, Mo., a horse of which they were owners, named "Hart Wallace," of the value of twenty-five thousand dollars; but that while the train was *en route* defendants servants in charge negligently placed the car containing the horse and about a dozen others in such position that it collided with another train and was wrecked, whereby the horse was injured, and plaintiffs were damaged the sum of fifteen hundred dollars.

Before and after filing its answer, defendant moved the court to consolidate the action with the three others mentioned, in each of which damage is prayed for by the respective plaintiffs, on account of injuries done to their horses while on the same car, and that the four actions be removed to the United State Circuit Court, but that motion was overruled. However, subsequently, the four actions were, without objection, tried together, and under instruction of the court a separate verdict was returned by the jury in favor of the plaintiffs in each action, though as to each the amount of recovery was limited to the maximum sum of liability fixed by the bill of lading.

It seems to us the motion to consolidate the four actions against objection of the parties plaintiff in

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each case, was properly overruled. The general rule prescribed in section 18, Civil Code, is that "every action must be prosecuted in the name of the real party in interest." And by section 22: "All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs."

Therefore, if the plaintiffs had all united originally in one action, the defendant would have had cause of demurrer. For, although the contract for shipping the horses was made with the defendant, and signed by one Weatherford as owner and shipper, he was, in fact, merely agent of each of the several firms to whom the animals respectively belonged, and neither could he have maintained an action, nor could any one of the four firms have sued for or recovered damages suffered by the others. The subject of each one of the actions was the injury done to the property of and consequent distinct damage to the plaintiffs who brought it; and the plaintiffs in the other actions did not have any interest in the subject, or in obtaining the relief therein demanded. If then, the plaintiffs need not, nor could have united in the same action, nor were indeed compelled to bring the different actions at the same time or in the same court, we do not see by what right the defendant could demand a consolidation of the actions after they are brought.

The main question is, whether the following stipulation in the contract of shipment is binding upon the plaintiffs: "And it is further agreed that should damage occur for which the said party of the first

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part may be liable, the value at the date and place of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, two hundred dollars; for a horse or mule, one hundred dollars; cattle, thirty dollars each; other animals, five dollars each; which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth."

The plaintiffs offered to prove, and averred in writing the witnesses introduced would prove, the following facts: That they are owners of the horse mentioned; that he was injured by the gross negligence of defendant's servants, as alleged in the petition, and that said injury was the sum of one thousand nine hundred and seventy-five dollars. But the court sustained defendant's objection to the evidence, and thereupon instructed the jury to find for the plaintiffs only the sum of two hundred dollars previously tendered by defendant, and the verdict was so returned.

It has been distinctly held by this court that a common carrier can not, by contract or otherwise, obtain exoneration from loss which has been the result of the negligence of himself or his agents (Louisville & Nashville R. Co., 14 Bush, 600), and the doctrine seems to have been generally sanctioned in this country, upon the ground public policy forbids an enforceable stipulation for exemption by a common carrier from consequences of his own negligence or that of his servants. (See *Hart v. Pennsylvania R. Co.*, 112 U. S., 331, and authorities there cited.) But whether a contract limiting the value of goods beyond which a common carrier is not to be held liable to the owner can be given effect

when the loss was occasioned by negligence of the carrier or his servants is a question upon which courts of this country are divided; though, as said in *Hutchinson on Carriers*, 260, the weight of authority is in favor of holding him to full responsibility without power by contract or in any other mode to relieve himself of it. And to that effect is decision of this court in *L. & N. R. Co. v. Owen*, 93 Ky., 201. We do not, in fact, see how, if it be admitted, as seems to be generally done, that a common carrier can not obtain exemption by contract from the general consequences of his negligence, he can make a valid and enforceable contract by which he may be exempted from paying full value of goods of the shipper destroyed or lost by his negligence; for if public policy forbids enforcement of a contract of exemption when loss is occasioned by negligence, it logically requires full, not partial, measure of compensation to the owner of goods so lost or destroyed. It seems to us a common carrier can not be injured or unfairly dealt with if simply required, in the usual course of business, to deliver the goods at the place of destination, or account to the shipper for their full value in case he, in violation of his contract, and by his own negligence or that of his servants, has lost or destroyed them; for if the goods are of high value, or the owner or bailee shall fix a high value upon them, it is always competent for the carrier or bailee to use care and expense, and then demand compensation for their carriage proportioned to such value. The shipment of the horse in this case was in the usual course of business, and the bill of lading signed by the agent

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of plaintiffs contained none other than the ordinary stipulations. It is not alleged the plaintiffs or their agent deceived defendant as to the value of the horse. Nor, though so argued by counsel, was the rate of freight lowered in consideration of the agreement of plaintiffs to accept less than actual value of their horse in case of loss or injury by negligence of defendant. The contract can not be fairly construed to mean that the reduction of freight rate was made from such consideration or inducement; nor is it even so alleged in defendant's answer. But the reduction of the freight was manifestly made by reason of the shipment of a dozen or more horses, including that of plaintiffs, in the same car, under one contract and one consignment of the goods.

Wherefore, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

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CASE 28—PETITION ORDINARY—TRANSFERRED TO EQUITY  
—MARCH 11.

### Reynolds v. White, &c.

APPEAL FROM CLAY CIRCUIT COURT.

**MORTGAGE—LONG CONTINUED POSSESSION OF MORTGAGEES—PRESUMPTION.**—Where mortgagees took possession of the mortgaged land, and without objection from the mortgagor, who lived in the immediate neighborhood of the land, claimed and exercised acts of ownership over it until their death, many years after the date of the mortgage, and their heirs were permitted, without objection or protest from the mortgagor, to divide the land among themselves twenty-nine years after the date of the mortgage, the mortgagor must be presumed to have parted with his title.

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Reynolds v. White, &c.

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**A. W. BAKER AND JAMES M. SEBASTIAN FOR APPELLANT.**

Long continued possession by the mortgagees and their heirs has deprived the mortgagor of the right to redeem, and vested those claiming under the mortgagees with a perfect title. (Gen. Stats., chap. 71, secs. 1, 16; 4 Bibb, 426; 1 Mar., 5; *Idem*, 452; 2 Dana, 29; 9 B. M., 83; 11 B. M., 98; 1 Duv., 884; 1 Dana, 60; 2 Dana 25; 8 Dana, 182; Gen. Stats., chap. 11, sec. 2; 18 B. M., 784; 2 Mar., 70; 6 Dana, 420; *Idem*, 426; 7 Dana, 165; 9 Dana, 391; 1 B. M., 46; *Idem*, 153; 2 B. M., 437; 4 B. M., 605; 7 B. M., 239; 13 B. M., 443; 18 B. M., 241; 3 Met., 37; 4 Dana, 479; 4 Bush, 631; 80 Ky., 101; 81 Ky., 391; 13 Am. Dec., 136; 85 Ky., 155; 8 Ky. Law Rep., 125; 2 S. W. Rep., 774; 7 Am. St. Rep., 579; Freeman on Co-tenancy, 221, 224; 2 Bl. Comm., 179.)

**JOHN L. SCOTT ON SAME SIDE.**

Cited: Pogue v. McKee, 8 Mar., 127; Hudgen v. Temple, 12 B. M., 201; Bellmore v. Caldwell, 2 Bibb, 76; Railroad Co. v. Kidd, 7 Dana, 247; Holderman v. Middleton, 6 Bush, 45; Hail v. Reid, 15 B. M., 490.

**B. P. WHITE AND J. C. WHITE FOR APPELLEES.**

1. The heirs of the patentee, Alexander White, are necessary parties to a complete determination of the questions involved in this action. (Civil Code, sections 18, 22, 23, 24.)
2. Any possession that C., J. and D. White may have had of the six hundred acres of land was not adverse to Alexander White's interest or title.
3. The sale of the thirty-six acres in controversy by H. L. White, executor, and the purchase of same by appellant, was champertous and void, as L. A. Byron was at the time in the adverse possession of the land.

**JOHN W. AND HARRY G. RODMAN ON SAME SIDE.**

Cited: Gen. Stats., chap. 11, art. 3, sec. 2; Kinsolving v. Pierce, 18 B. M., 784; Speed v. Buford, 3 Bibb, 74; Neely v. Butler, 10 B. M., 50; Carrine v. Westerfield, 3 Mar., 331; J. M. & I. R. Co. v. Esterlee, 13 Bush, 667.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

In 1834 a patent for six hundred acres of land was issued to Alexander White and Messenger Lewis, and in 1835 the latter sold and conveyed his undivided half thereof to C., J. & D. White, three brothers and co-partners.

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Reynolds v. White, &c.

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In 1852 Alexander White, being indebted to them a large sum of money, mortgaged all his landed estate, including his undivided half in said six hundred acres, to C., J. & D. White, retaining, however, possession of his home place.

In 1875, C., J. & D. White all being dead, the heirs at law of D. White instituted an action against the heirs and devisees of C. White and J. White for a partition of all the lands owned by the firm of three brothers. In the list of lands alleged to belong to C., J. & D. White and subject to partition between their respective heirs and devisees, was the tract of six hundred acres patented to Alexander White and Messenger Lewis. And it was stated in the petition that Alexander White had conveyed his undivided half of that tract to C., J. & D. White before they died, but that the deed had been lost. However, by the judgment rendered in that action the tract of six hundred acres was, in fact, partitioned, and one hundred acres of it besides other tracts was allotted by the commissioners appointed by court, to the heirs and devisees of J. or James White, and a deed made to them therefor in 1881.

In 1883 H. L. White, executor of the will of James White, and empowered thereby to do so, sold and conveyed to appellant Reynolds, all the land that had, in the action mentioned, been allotted to the heirs and devisees of J. or James White, including the parcel of one hundred acres that had been taken off the tract of six hundred acres, and for description and identification of the land so sold and conveyed to Reynolds, reference was made to deed of

the commissioner to James White's heirs and devisees. The land in controversy in this action is a parcel of thirty-six acres inside the boundary of the original six hundred-acre tract, and also within boundary of the one hundred acres taken therefrom and allotted to said heirs and devisees. And the cause of this action, which was at first placed on the ordinary docket, is alleged trespass by the defendants, B. P. White and J. C. White, in cutting and carrying timber away from the thirty-six acres. It is proper here to state that neither of the defendants claim the land as heirs at law of any one of the three brothers, C., J. & D. White, though defendant, B. P. White, is the husband of one of the heirs, and was a party to the action instituted in 1875 for division of the lands.

In their answer they state that prior to his death, though subsequent to death of the other two members of the firm of C., J. & D. White, D. or Dougherty White caused executions to issue on judgment or judgments in favor of the firm against Alexander White, and to be levied on various tracts of land owned by him; that after the executions were levied, he, Dougherty White, made an agreement with one L. A. Byron, by which the latter, upon bidding and paying four hundred dollars for certain parcels of the land, one of which was the thirty-six acres in controversy, was to have made to him by D. White, the surviving member of the firm of C., J. & D. White, a complete title to the land thus bid for and purchased by him; and thus claiming the parcel of thirty-six acres, L. A. Byron, they allege in the answer, in 1889



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conveyed it to defendants, B. P. White and J. C. White. But there is not filed in this record, nor accounted for, a copy of either the judgment or execution against Alexander White, nor the original or copy of either a deed to L. A. Byron or the one from him to the defendants. In fact it is not shown, nor attempted to be shown by any but oral testimony, that is both incompetent and vague, that there ever was such judgment, execution or sale, and L. A. Byron stands without a vestige of paper title to the thirty-six acres. Nor does claim of title by possession avail him; for no survey was made, even if he had paper title, by which to show the parcel of thirty-six acres is included in the boundary of land sold by the sheriff, if he, in fact, ever made any such sale. On the other hand, the plaintiff traces his title to an undivided half of the parcel of thirty-six acres by regular and connected chain to the Commonwealth, and possession and claim of absolute title to the whole from 1883, when the executor of J. White sold and conveyed to him.

It is, however, alleged, and attempted to be shown, that in 1889, about the time they state L. A. Byron sold and conveyed to defendants, the plaintiff disclaimed ownership of the parcel of thirty-six acres, and that the defendants were thereby misled and induced to purchase. But we think that allegation is not sustained by the proof; for, according to the statements of witnesses, L. A. Byron sold and conveyed to defendants in 1889 several tracts of land, including the parcel of thirty-six acres, but refused to warrant the title to that parcel, thus showing the

parties to that deed knew of the title and claim of the plaintiff, Reynolds. The parcel of thirty-six acres seems to be on opposite side of a dividing ridge from the residue of the tract of one hundred acres, and Reynolds admits he did not, in 1889, certainly know whether it was included in the deed made to him in 1883, but insisted upon claiming all within his boundary. The testimony and report of the surveyor in this case place it beyond doubt that the parcel of thirty six acres is inside the boundary of the six hundred acres, and was allotted to the heirs of James White, whose executor conveyed to Reynolds. Indeed, it is impliedly admitted by the defendants that the parcel of thirty-six acres was conveyed by commissioners to James White's heirs; for they allege in their answer a mistake was made by the commissioners in running the lines so as to include it, and ask the deed be reformed, which, of course, can not now be done.

This action having been transferred to equity upon motion of defendants, it certainly was competent for the chancellor, and as we believe his duty, to have adjudged the plaintiff, Reynolds, entitled to at least one-half the land in dispute, and consequently to one-half the value of the timber cut and carried away by defendants.

The real and only question in this case is, whether the plaintiff is owner of all the land in dispute. He is, if Alexander White was divested of title to his original undivided half of the six hundred acre tract at the time the division took place in 1881.

There is no evidence the mortgage executed by

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Reynolds v. White, &c.

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Alexander White in 1852 was ever enforced, nor does it appear he ever paid any part of the mortgage debt. On the contrary the evidence in this case satisfactorily shows he never was able to do so. There is evidence tending to show that C., J. & D. White took possession of the six hundred acres not long after the mortgage of 1852, and held, claimed and exercised acts of ownership over it till they died. And notwithstanding Alexander White was living in the immediate neighborhood of the six hundred acre tract in 1881, he permitted the heirs at law of C., J. & D. White, the mortgagees, without objection or protest, to obtain judgment for division and allotment of the six hundred acre tract among themselves, and thereafter to possess, claim and sell the different parts of it. It seems to us that after the lapse of twenty-nine years from the date of the mortgage in 1852, to the division among the heirs at law of C., J. & D. White in 1881 without setting up any claim himself, or objecting to the claim, possession and acts of absolute ownership by C., J. & D. White while they lived, and of their heirs at law afterwards, which finally culminated in a division and allotment of it, that Alexander White must be presumed to have parted with his title, especially when it is satisfactorily shown he was fully aware of the condition of affairs, and yet, during that long period, never asserted or exercised any acts of ownership of the land, or claimed to have paid any part of the mortgage debt.

If, then, the heirs at law of C., J. & D. White had, when the division took place in 1881, acquired title

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Bradbury v. Walton, &c.

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to the entire tract of six hundred acres, whether paper or possessory, it was transmitted as to one hundred acres thereof, including the thirty-six acres in dispute, unimpaired to the plaintiff Reynolds. And that they had so acquired it in virtue of twenty-nine years of continued and undisputed possession and claim of ownership, we think the evidence conclusively shows. For there is no other way to account for the conduct of the mortgagees and creditors in failing to enforce their lien, and to seek collection of the mortgage debt, and of the conduct of the mortgagor and debtor in acquiescing in their possession and claim of the land for twenty-nine years, without any assertion of title or claim to the land, or any pretense he had paid or ever attempted to pay any part of the debt.

Wherefore the judgment is reversed, and cause remanded for judgment in favor of plaintiff for the land and inquiry as to damages he is entitled to by reason of the trespass complained of.

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CASE 24—PETITION EQUITY—MARCH 11.**Bradbury v. Walton, &c.****APPEAL FROM MASON CIRCUIT COURT.**

1. THE LEGISLATURE HAS POWER TO AUTHORIZE THE COUNTY COURT TO CLOSE OR DISCONTINUE PUBLIC ROADS without making compensation to the owners of abutting property, although no such power exists as to the streets of a town or city.
2. THE JUDGMENT OF A COUNTY COURT CLOSING A PUBLIC ROAD IS CONCLUSIVE as to parties to the proceeding, until set aside or reversed.

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Bradbury v. Walton, &c.

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**EDWARD W. HINES FOR APPELLANT.**

1. So far as the rights of abutting property owners are concerned, there is no difference between the streets of a city and the public roads of a county. Both are public highways, and in each case the abutting property owner has an inviolable right to the unobstructed use of the contiguous highway, of which he can not be deprived without just compensation. (*Transylvania University v. City of Lexington*, 3 B. M., 25; *Gargan, &c., v. Railroad Co.*, 89 Ky., 212; *Bannon v. Rohmeiser*, 90 Ky., 48; *Elliott on Roads and Streets*, p. 662.)
2. If the statute (General Stats, chap. 110, sec. 13), under which the county court acted is unconstitutional, all proceedings under it are void, and therefore the judgment of the county court is not conclusive. (*Freeman on Judgments*, § 120.)

**T. C. CAMPBELL AND A. M. J. COCHRAN, OF COUNSEL ON SAME SIDE.**

**E. L. WORTHINGTON FOR APPELLEES.**

- 1 The judgment of the county court is conclusive. (2 Black on Judgments, secs. 812, 795, 781.)
2. The owner of a farm in the country has no *private property rights* in a county road, such as an abutting lot-owner has in a city street. (*Transylvania University v. City of Lexington*, 3 B. M., 27; *E. L. & B. S. R. Co. v. Jackson*, 9 Ky. Law Rep., 242; *Lexington & Ohio R. Co. v. Applegate*, 8 Dana, 294; *Campbel. Turnpike Co. v. Dye*, 18 B. M., 761; *E. & P. R. Co. v. Thompson*, 79 Ky., 52; *Rowan v. The Town of Portland*, 8 B. M., 286; *L. St. L. & T. Ry Co. v. Hess, &c.* 92 Ky., 407.)

**GARRETT S. WALL OF COUNSEL ON SAME SIDE.**

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

The contention by the appellant in this case is, that the statute authorizing the county court to close lateral roads, or what is known as ordinary highways, when running within a certain distance of a turnpike road (one mile), is unconstitutional. It appears from the petition filed, in which it is alleged that the closing of a lateral road by the defendants was an interference with the right of the appellant to pass from one part of his land to another, that the road had

been ordered closed by the county court of Mason in a proceeding under chapter 110 of the General Statutes, to which the appellant was a party, and that he appeared in that court and resisted the motion. It seems to us that proceeding must bar the recovery of the appellant in this case. The appellee closed the highway on his own land, and by virtue of the judgment of the county court, and until that order is reversed it is binding on both the public and the appellant. It is argued, however, that the act is unconstitutional, and, if so, the judgment of the county court is a mere nullity; and if this view of the question was even conceded, with the broad and almost unlimited power of county courts over the highways of the State within their jurisdiction, it must be held that a proceeding to close, alter or discontinue a public road, with the party complaining a party to that proceeding, and a judgment entered, such a judgment must be deemed conclusive so long as it remains in force. The appellee closed the road on his own land, and therefore no trespass was committed by an entry on appellant's land, and unless the latter had some right of property in this easement, not only on his own land, but on the land of the appellee, no action can be maintained by reason of the wrong complained of.

The public highways of the State, known as county roads, are opened and maintained for the public, and not for mere individual use, and whenever it may be deemed proper to close, alter or discontinue a county road the power is given to the county court to make such changes as may be conducive to the public wel-

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fare, and the right to close a highway that affects the travel on a turnpike is expressly given the county court, to be exercised only when the public good requires it, and of this the county court must be the exclusive judge, and its action only subject to review by some higher tribunal. It was to encourage the construction of better and more permanent roads for the convenience of trade and travel, and to prevent the avoidance of turnpike gates, that the statute was enacted, and in such cases mere private convenience has been subordinated to the public good.

A private citizen has no right of property in a public road, although it passes over his own land, unless he owns the land itself subject to the easement. If the owner of land abutting on a public road has a right of property in the easement, it necessarily follows that no change or alteration can be made without first making compensation to the owner, as it would be a taking of private property for public use without compensation; but he has no other interest except such as is common to the entire public, and where he is the owner of the land and the road is discontinued, its use then reverts to him to the extent he has title, but no further.

This court in the case of Lexington and Ohio R. Co. v. Applegate, reported in 8 Dana, 294, recognizes the distinction between the streets of a town or city and an ordinary public way. "An ordinary public way," says the court in that case, "may be discontinued or applied to some other public purpose than that for which it was first established, without any legal liability for pecuniary compensation to the local

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public or to any owner of adjoining land—because neither such public nor proprietor had any right of *property* in the *way*, or any other legal interest in it than that which was common to all the people.”

The distinction is this: Ordinary highways, or what are termed county roads, are created by law for the public, and the land or its use taken from the owner in the first place by paying him its value; or there may be sometimes such a dedication by the individual owner and an acceptance by the county court, as will create this easement without compensation. The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot-owner, the grantor, or the party making the dedication, saying to the owners of lots, this right of ingress and egress you shall have. But not so with an ordinary public road. The State creates the easement for the entire public; its use is that of the public, one citizen having as much right to this use as the other, and when its abandonment or non-use is deemed necessary for the public good, the county court may discontinue it altogether, and in that tribunal the question must be made. In the case of *Campbell Turnpike Company v. Dye, &c.*, reported in 18 B. M., 761, the construction of this same statute was the matter in controversy. The statute reads: “No lateral road shall be opened to and from the same places now connected by any turnpike, gravel or plank road, or which may hereafter be so connected, as to run within one mile of such road; and any such lateral road now in use, or which may hereafter be in use, shall, by order of the county court, be



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shut up and closed. But such lateral roads shall not be precluded from so running as near as a mile for the distance of one mile from any town or city." (General Statutes, chap. 110, sec. 13.)

The court, in alluding to the argument made by counsel as to the individual injury that must result to the owner of the abutting land, expressed the opinion that no such question could be raised on the hearing in the county court, the statute being imperative as to discontinuing the road. All the county court could do was to obey the statute. It is true the constitutional question was not raised in that case, but the inconveniences resulting to the land owners were greater in that case than in this, and such as to suggest to court and counsel the importance of a careful consideration of the question; and besides this court has, since the case referred to, passed upon the rights of the land owner in that class of cases more than once in manuscript opinions, and while no constitutional question was made, we are satisfied the statute would have been held valid in those cases, as it must be in this. -

Judgment sustaining the demurrer to the petition is affirmed.

Greer v. Louisville &amp; Nashville Railroad Co.

CASE 25—PETITION ORDINARY—MARCH 11.

Greer v. Louisville & Nashville Railroad Com-  
pany.Louisville & Nashville Railroad Company v.  
Greer.

APPEALS FROM MARION CIRCUIT COURT.

1. **GROSS NEGLIGENCE.**—The absence of slight care in the management of a railroad train is gross negligence.
2. **NEGLECT—EVIDENCE.**—As the only negligence alleged in the petition related to the act of driving or operating the train, it was error to admit evidence as to the unsafe and defective condition of the track or of any portion of the train's make-up. And, although negligence in these regards was not made the subject of an instruction, the evidence was prejudicial, as these circumstances were not detailed as mere incidents of the transaction, but witnesses were introduced solely on these matters, and for the express purpose of making them the basis of a claim for damages.
3. **AN AMENDED PETITION** tendered by plaintiff at the appearance term, setting up additional acts of negligence, should have been filed, as it did not change the cause of action; but the court having rejected it, it was error to defendant's prejudice to admit evidence as to such additional acts of negligence, such evidence not being competent under the original petition.
4. **LIFE TABLES AS EVIDENCE.**—In an action to recover damages for personal injuries permanent in their nature, it is not improper to admit in evidence standard life tables to show the expectancy of life of a person of the age of plaintiff. But the proof must be taken subject to the conditions surrounding the plaintiff, and hence the existence of disease tending to shorten life may be shown.
5. **MEASURE OF DAMAGES FOR PERSONAL INJURIES.**—In such cases the jury should be instructed that in estimating the damages they are to take into consideration the age and situation of plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injuries received, and the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury.
6. **FELLOW-SERVANTS.**—As the plaintiff received his injuries while acting as brakeman he must, in order to recover, show that he was injured.

94	169
100	445

94	169
104	517

94	169
118	275

94	169
121	532
121	533
122	745

94	169
125	362
127	740

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Greer v. Louisville & Nashville Railroad Co.

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through the negligence of employes who were his superiors in point of authority and control, and also that their negligence was gross, as the only negligence complained of was that of servants associated with him in conducting the cars. It is only when the injured employe and the negligent employe are in different departments of service that a recovery may be had for ordinary negligence.

7. **SAME.**—A fireman, when acting as engineer, is the superior of the brakeman.
8. **RAILROADS—INJURY TO BRAKEMAN—INSTRUCTIONS TO JURY.**—It was error to instruct the jury that if the risk and danger of going between the cars was "open and visible" to plaintiff when he went in to do the uncoupling, they should find for defendant. While the brakeman must take the ordinary risk of going between cars when in motion, and such risk is necessarily open and visible, the company is not relieved from liability for the gross negligence of the conductor and engineer in failing to exercise any care for his protection while thus in peril.

**W. J. LISLE FOR LOUISVILLE AND NASHVILLE RAILROAD COMPANY.**

1. One entering service is presumed to understand the business and to be able to transact it with experience and skill, and he can not be heard to complain that he did not have the experience and skill. (Alexander v. Lou. & Nash. R. Co., 88 Ky., 589; Bogenschutz v. Smith, 84 Ky., 380; Derby's Adm'r v. Ky. Cent. R. Co., 9 Ky. Law Rep., 158; Ray v. Jeffries, 86 Ky., 867.)
2. A servant can not recover of the master for the negligent acts of a co-servant, unless that co-servant was his superior in the prosecution of the business resulting in the injury. And among brakemen on a train one is not the superior of the other. (Collins v. L. & N. R. Co., 2 Duv., 114; L. & N. R. Co., v. Cable, 9 Ky. Law Rep., 439; L. & N. R. Co., v. Coniff's Adm'r, 90 Ky. 560.)

And the philosophy of this rule is that a servant necessarily assumes the risks and hazards ordinarily incident to his business, such as with ordinary care he can guard against. (Sullivan v. Louisville Bridge Co., 9 Bush, 81; N. N. & M. V. Co. v. Bowles, 18 Ky. Law Rep., 208.)

3. If to do any act is plainly and openly attended with danger and likely to result in injury to the servant, the law requires such servant not to comply with the master's direction requiring the act done, otherwise the servant takes the risk of accident on himself. (Beach on Contrib. Neg., sec. 135; Wood on Railways, p. 1454; Sullivan v. Lou. Bridge Co., 9 Bush, 81; Quaid v. Cornwall, 18 Bush, 604; Needham v. L. & N. R. Co., 85 Ky., 428.)
4. It was error to appellant's prejudice to permit appellee to prove to the jury his life expectancy by the mortality tables.

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Greer v. Louisville & Nashville Railroad Co.

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The case of *L. C. & L. R. Co. v. Mahoney's Adm'r*, 7 Bush, 288, distinguished.

5. As no question was raised in the pleadings as to the safety of the track or defective condition of materials used by plaintiff or of injuries to his arm, the court erred in submitting testimony as to those matters. (*Bogenschutz v. Smith*, 84 Ky., 380.)
6. The Code forbids a new trial on account of the smallness of damages in an action like this. (Civil Code, sec. 341.)

**HUGH P. COOPER FOR GREER.**

1. The court erred in striking from plaintiff's reply all that part which referred to the guard rail, and in excluding from the jury, by instructions, the question of negligence with reference to that matter.
2. The court erred in the same line by refusing to permit plaintiff to file his amended petition.
3. The court should have given instruction No. 7 asked by plaintiff.
4. The absence of slight care in keeping a railroad track in repair is gross negligence.
5. The employees of a railroad company whose duty it is to keep the track in repair are not fellow servants of the brakemen.

Cited on the whole case: *Lou. & Nash. R. Co., v. Mitchell*, 87 Ky., 327; *L. & N. R. Co. v. Moore*, 88 Ky., 675; *N. N. & M. V. Co. v. Dentzel's Adm'r*, 12 Ky. Law Rep., 626; *L. C. & L. R. Co. v. Mahoney's Adm'r*, 7 Bush, 285; *Maysville, &c., R. Co. v. Herrick*, 13 Bush, 127; *Ky. Cent. R. Co. v. Boyd*, 13 Ky. L. R., 862.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

James Greer, as plaintiff in the lower court, brought this action against the Louisville and Nashville Railroad Company for negligently driving its car or cars upon and over his leg, crushing it in such manner as to cause its necessary amputation, and alleging that by reason of the defendant's negligence, plaintiff lost his left leg, and endured great mental and physical suffering, &c., to his damage in the sum of twenty-five thousand dollars. He recovered the sum of two thousand five hundred dollars. Thereupon the defendant prosecuted an appeal to the Superior Court and the plaintiff prosecuted one to this court. On plaintiff's

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motion the case in the Superior Court was transferred here, and the two appeals—being one and the same case—are heard together.

At the Lebanon switch-yard, on the line of defendant's road, it became necessary to place two gondola cars on one of the side tracks and some box-cars on another. There was some haste required, as the conductor's purpose was to keep from being held there by the next train going south. So Greer was directed by the conductor, when asked if he wanted the cars placed back against the "dead" cars, "to just drop them in clear of the main track," as he was in a hurry. "Dropping them back" meant "to cut them loose whilst moving, so that the loose cars would roll back to their place by the dead ones." The conductor then signaled the engineer to back in, and it appears left, going south several car lengths toward the depot, and when the accident happened was engaged in chalking some cars to indicate their destination. The plaintiff went in to uncouple or cut loose the two cars in obedience to the instructions as he understood them, not knowing but that the conductor was near at hand to protect him. He found the pin crooked so that he could not pull it out, and walked with one foot on the outside and the other on the inside of the track for some fifteen or twenty feet, when, as affording him more strength for extricating the pin, he brought both feet within the rails of the track, and after taking a step or two his foot caught on the end of the guard-rail, or, as testified to by him, "a splinter on the guard-rail at the frog of the switch stuck into the toe of his shoe." With his right

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hand he had hold of the car in his front, and pulled his foot loose, but, losing his balance, was dragged some distance, when he fell to the ground on his hands and feet, and ran in that way some distance. From the guard-rail splinter to where he finally threw his body from under the car when his foot was caught was some twenty-five yards. When he went in to uncouple the cars, he testifies, they were moving at the rate of about two miles an hour, but their speed was increased rapidly, and they were going, when plaintiff was injured, about five miles per hour. The train struck the "dead" cars violently, knocking them back some seventy feet. A fellow-brakeman was on top of one of the box-cars, and saw Greer when he first started to fall, and testifies that he got down off the car and ran out on the opposite side from him in order to signal Martin, the fireman, who had been left in charge of the engine by the regular engineer. The fireman was waiting for signals, and appears to have known nothing of the trouble until it was about over.

In this connection it may be observed that the company introduced an order or certificate of its master mechanic, of date December 11, 1890, to the effect that Martin was declared competent, and was authorized to handle an engine as per rule 207, which made it "the duty of an engineer to handle his engine at all times, but a fireman may do so at a station in the immediate presence of the engine-man, provided the master mechanic has declared him competent."

This declaration of competency was some six weeks after Martin had been left in charge of this engine, in violation, it appears, of rule 207.

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Upon this state of case the defendant company moved the court for a peremptory instruction in their behalf, which, we think, was properly overruled. That there was some negligence we have no doubt, and that, too, on the part of employes superior to the plaintiff in point of employment and control of the train. It is true that there must have been gross negligence in this case before the plaintiff can recover, but as was said in *Louisville and Nashville Railroad Company v. Mitchell*, 87 Ky., 337: "Certainly the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence."

On the trial much prominence was given to the testimony of various witnesses as to the condition of the guard rail, the crooked pin and the injured condition of plaintiff's arm. This testimony was objected to by the defendant, and we think the objection should have been sustained. These circumstances, if regarded as a mere matter of detail, or as incidents of the transaction, might not have been objectionable, as it is hardly possible to detail the occurrence without stating all the conditions and surroundings as they existed at the time. But witnesses were introduced solely on these matters, and for the express purpose of making them the basis of a claim for damages. This was not proper under the pleadings. The unsafe or defective condition of the track, or of any portion of the train's make up, or the sprained condition of plaintiff's arm, was not the subject matter of inquiry. These defects were not alleged as grounds of complaint or as matters of neg-

ligence. Nor are they so connected or interwoven in any way with the act of driving or operating the train—the only negligence charged in the petition—as to be the proper subject of testimony. That its introduction was prejudicial to the defendant is apparent; indeed the argument of plaintiffs counsel in this court consists largely in denouncing the negligence of defendant, as shown by the unsafe track and the crooked pin. What must have been his appeal to the jury? And while these alleged evidences of negligence are not made the subject of an instruction, and for that reason might be regarded under some circumstances as having been withdrawn from the jury's consideration as a basis for finding damages for negligence, it is evident that such was not the effect on the trial below. But the case having to go back, it is proper to say that the amended petition tendered by the plaintiff at the appearance term of the case, setting up these additional grounds of complaint as matters of negligence, should be permitted to be filed. The cause of action is not changed. The alleged acts of negligence all may have concurred to cause the injury. It was error to the plaintiff's prejudice to refuse to allow it to be filed, but the court having rejected it, the defendant was under no legal requirement to meet it by counter proof, and may not have been prepared to try the case on issues not presented by the pleading.

In the case of Cincinnati, &c., R. Co. v. Barker (94 Ky., 71), decided at this term, where the subject matter of the negligence charged was the setting fire to a depot, it was held that the construction and



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combustibility of the structure alleged to have been fired were necessarily and naturally proper subjects of inquiry and of instruction. In this case, the act of driving the car over the plaintiff involved only the operation and management of the train, and was in no way connected with the unsafe condition of the guard-rail or the crookedness of the coupling pin.

It is insisted by the company that it was error to its prejudice to permit the witness, Blandford, a life insurance agent, to read as evidence to the jury the American Life Table, showing the expectancy of a man of plaintiff's age. On this there appears to be no direct authority or precedent in this State. The cases in which such testimony has been offered and approved have been those in which loss of life has occurred.

In Thompson's Carriers of Passengers, 565, it is said: "It is also competent for the plaintiff to show that the injuries complained of are permanent in their nature; that he will probably not recover from their effects; and when there is such testimony, it is not improper to introduce in evidence standard life tables to show the expectancy of life of one of the age of the injured party as a basis upon which to estimate the amount of damages he should recover."

It is said "that in actions for personal injuries occasioned by the negligence of the defendant, on the question of damages, it is not only proper but important for the plaintiff to show, by the evidence, his previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pe-

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cuniary damage." (City of Joliet v. Conway, 119 Ill., 489.) And if so, and we think the doctrine appears reasonable, there would seem to be no reason why, as the ability to labor and the earning capacity of the injured party may be inquired into, the duration of that capacity and ability to labor may not be ascertained by the usual mode of computing the probable length of life. But the proof must be taken subject to the conditions surrounding the particular individual under investigation. Hence, the existence of disease tending to shorten life may be shown, and it must also be borne in mind that mere probable continuance of life is shown by such tables, not the duration of ability to work or to earn money in old age. (Sedgwick on Damages, volume 2, section 581.) And when we add to these complications that a proper discrimination must be made between the lessening of earning capacity by reason of the loss of a finger and that occasioned by the loss of a leg, we confess the introduction of such testimony will hardly tend to enlighten the jury to any great extent. We can not say, however, that such proof is incompetent. On the whole, it would seem better, if the jury are to find for the plaintiff in a given case, that they should be instructed in estimating the amount of the damages, to take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury received. (Whalen v. St. Louis, &c., R. Co., 60 Mo., 324.)

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By instruction "I," given at the company's instance, and properly, the jury were told not to find for plaintiff, unless they believed from the evidence "that those superior in authority to plaintiff in operating the train, with gross negligence ran said train or car wheels over plaintiff's ankle and crushed it."

But in No. 1, given by the court over the defendant's objection, they are told that if the preponderance of the evidence shows that the defendant's employees in operating their train, or failing to control its movements properly, were guilty of ordinary, gross or willful neglect, by which plaintiff was injured, &c., the law was for the plaintiff.

This instruction is erroneous in two respects. The employees must have been those who were superior to plaintiff in point of authority and control, and the negligence must have been gross.

In the leading case of *Louisville and Nashville R. Co. v. Collins*, 2 Duv., 114, and which has been followed invariably since in this court, Judge Robertson said: "It"—the company—"is therefore responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill—as to strangers, ordinary negligence is sufficient—as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross—but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient;" and it may be here added

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that a fireman, when acting as an engineer, is, of course, an employe, superior to the brakeman. (Louisville and Nashville R. Co., v. Moore, 83 Ky., 675.)

At the defendant's instance, and over the plaintiff's objection, the jury, by instruction "A," were told that if the risk and danger of going between the cars was apparent, open and visible to plaintiff when he went in to do the uncoupling of the cars, the jury should find for the defendant. This is misleading and erroneous. The brakeman may, indeed must, take the ordinary risk of going between cars when in motion, as the practice is shown to exist by common acquiescence, if not at the express direction of the companies, and such risk is necessarily open and visible; but it by no means follows that the conductor and engineer may desert him in his hour of peril, and the company be relieved of the consequences of the gross negligence of these officials, if guilty of such negligence, although the danger and risk imposed on the inferior employe be open and visible.

The errors considered on the two appeals appearing to have been to the prejudice of both plaintiff and defendant, this seems to be a proper case for a division of the costs of the appeals, and such may be made. .

Let the judgment be reversed, and cause remanded with directions to proceed as herein indicated.

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Colyer v. Hyden, &c.

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CASE 26—PETITION EQUITY—MARCH 16.

**Colyer v. Hyden, &c.**

APPEAL FROM PULASKI CIRCUIT COURT.

1. **A DEED MAY BE DELIVERED TO A THIRD PERSON FOR THE GRANTEE,** and if subsequently assented to by the grantee, it will be as good a delivery as if it had been made directly to him. And this is true, although the deed may not have been delivered to or accepted by the grantee until after the death of the grantor.
2. **DELIVERY OF DEED.**—Where the grantor handed to his wife a deed in which his children were named as grantees, and told her to put it away or to take care of it, and after the death of the grantor she delivered it to the grantees, there was no delivery of the deed so as to pass the estate. The fact that the grantor had retained a life estate in the property and may have thought the immediate delivery of the deed would be of no service to the grantees, did not dispense with the necessity of delivery.

**WILL C. CURD FOR APPELLANT.**

There was a sufficient delivery of the deeds. (*Bell v. Farmers' Bank*, 11 Bush, 89; 5 Am. & Eng. Enc. of Law, p. 448, note 4.)

**O. H. WADDLE FOR APPELLEES.**

The deeds were properly set aside. They were procured by undue influence, were never delivered, and were without consideration to uphold them.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

A few weeks before his death, Alex. Colyer, who was quite old and decrepit, executed three deeds for certain lands of which he was the owner, in two of which the appellant, who was his grandson, was alone the designated grantee; in the other the appellant, jointly with Susannah Colyer, his step-daughter, and L. R. Colyer, a son, were the grantees named. The validity of these conveyances was assailed by the other children of the deceased—the appellees here—

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Colyer v. Hyden, &c.

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by reason of the mental inability of the grantor, the exercise of undue influence over him, and because the alleged conveyances were never delivered to the grantees in the life-time of the grantor. The lower court upheld one of the deeds—that to the appellant for the home place of some seventy acres—and set aside the other two.

We think there can be no question of the correctness of the judgment sustaining the first-named deed. The old man had contracted in writing with his grandson some time in 1888 to the effect that he would give him the home place, provided he would come home from the West and live with him, and care for him and his wife. They were both old and feeble, and needed his help. The grandson did so, and shortly before his death the grantor had the deputy clerk to prepare the deed, which he executed in pursuance of the original contract, and delivered to the draftsman, who proves he delivered it to the appellant in a few days thereafter.

There appears to have been no lack of capacity to make the deeds, and no evidence of the exercise of undue influence in their procurement. We think, too, that there was a legal delivery of the deed for the twenty-five acre tract to the appellant. It was signed and acknowledged by the old man and his wife, and delivered to the draftsman, the deputy clerk, for the grantee, and delivered to and accepted by him in some three or four weeks thereafter, though after the death of the grantor.

It is now fully settled that a deed may be delivered to a third person for the grantee, and if subsequently

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Colyer v. Hyden, &c.

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assented to by the grantee it will be as good a delivery as if it had been made directly to him. (*Fonda v. Van Horne*, 15 Wend., 633.)

With respect to the joint deed for the two hundred acre tract, the state of case is different. After its preparation and acknowledgment, the grantor handed it to his wife, and told her to put it away, or to take care of it. There was no delivery of it to any of the grantees, or to any one for them, until after the grantor's death, when his wife gave it to the husband of one of the grantees. We think there was no delivery of this deed so as to pass the estate. It seems to have been the intention of the grantor to keep control over the instrument until fully determined whether ultimately to deliver it.

It may be inferred that because he had retained a life estate in the property, he thought its immediate delivery would be of no service to the grantees, and that his intention is clear that they should have the property at his death. And yet, the fact remains, he did not deliver it, or authorize or direct its delivery, and can not, therefore, be said to have divested himself of the title to the estate. In *Maynard v. Maynard*, 10 Mass., 456, the deed was executed with the usual formalities and recorded, and "the grantor requested the witness to keep the deed until it was called for." The grantee died; the grantor called for and cancelled it. The court said it was clear that no title passed. "The only reason why it did not pass," said the court, "was that the deed was not delivered as the deed of the grantor for the use of the grantee."

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Martin v. Richardson.

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There appears to have been no error in setting off the appellant's claim against the estate by the one-half of his note. The result reached by the chancellor seems just and proper.

Because of the error indicated the judgment is reversed, with directions to proceed as herein determined.

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CASE 27—PETITION ORDINARY—MARCH 18.

## Martin v. Richardson.

APPEAL FROM UNION CIRCUIT COURT.

1. **VALIDITY OF TRANSACTION GROWING OUT OF ILLEGAL ACT.**—If an act in violation of law be already committed, a subsequent agreement founded thereon is valid, provided it constituted no part of the original inducement or consideration of the illegal act.
2. **SAME.—OBTAINING LOTTERY TICKET BY FRAUD.**—Where one by fraudulent representations obtains possession of a lottery ticket which has drawn a prize, and receives the money thereon, he is to be regarded as collecting the money for the use of the rightful owner of the ticket, who may maintain an action therefor, although he originally purchased the ticket from the defendant in violation of law, and parted with it to defendant in exchange for another lottery ticket, the exchange being induced by defendant's fraud.
3. **PRESUMPTIONS.**—In all such cases every presumption is in favor of the legality of the transaction, and even if the fact that the lottery ticket was purchased in Kentucky, and therefore in violation of law, would prevent a recovery, it must be presumed, in the absence of proof to the contrary, that the ticket was not purchased or exchanged in Kentucky, but in some place where it was lawful to purchase or exchange it.
4. **SAME.—PLEADING.**—As the defendant denied by his answer that the plaintiff had ever owned or held the ticket which the plaintiff alleged in his petition defendant had obtained from him by fraud, certain transactions set up by defendant in his answer as to the sale by him to plaintiff of lottery tickets and their subsequent exchange, which transactions he alleges occurred in Kentucky, necessarily excluded the transaction with reference to the particular ticket in question

94	183
100	618
94	183
107	80

94	183
112	617

94	183
114	807
115	200

94	183
135	736

94	183
132	709



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here, and therefore it does not appear from the pleadings, which are alone presented for review, that this ticket was purchased or exchanged in Kentucky, it not being so alleged in the petition.

**ADAIR & MORTON FOR APPELLANT.**

1. The appellee acquired no legal title to the tickets in the Little Louisiana Lottery, nor to any prize drawn by them, under the purchase from appellant. (Gen. Stats, chap. 29, art. 23, sec. 3; *Idem*, chap. 22, sec. 5; 18 Am. & Eng. Enc. of Law, p. 1167; *Idem*, p. 1187.)
2. The exchange of tickets was an exchange of articles without any value. Neither ticket was worth any thing, except it was made valuable by the voluntary act of the lottery company. Therefore, appellee lost nothing by the exchange, and the law will not recognize and adjudicate transactions involving no valuable consideration. There can be no assumption (as in the case of *Bibb, &c., v. Miller, &c.*, 11 Bush, 310), that the lottery was legal, it being admitted by the pleadings that the lottery in Kentucky (where the contract was made) was illegal.
3. The exchange of tickets, although occurring after the drawing, was as much in violation of our statute as if made before the drawing occurred, and appellee would have as much right to sue for the ticket itself as for its proceeds.

Whenever the contract which the party seeks to enforce is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. And persons co-operating in an illegal transaction can not obtain relief from the courts. (*Buck v. Albee*, 26 Vt., p. 184; *Chitty on Contracts*, p. 730; *Dun-canson v. McLuer*, 4 Dallas, 306.)

**WM. LINDSAY AND EDWARD W. HINES FOR APPELLEE.**

1. There is nothing in the pleadings to show that the ticket which drew the prize was purchased or subsequently exchanged in Kentucky, and, therefore, the court can not know that the transaction was in violation of law. In fact, the presumption is in favor of the transaction, and if it be susceptible of two meanings, the one legal and the other not, that interpretation will be put upon it which will support and give it operation. (*Bibb, &c., v. Miller, &c.*, 11 Bush, 309.)
2. As the legality of the Little Louisiana Lottery was in issue, and the evidence is not here, this court must presume that its legality was proved, or rather that it was not proved to be illegal, the presumption being in favor of its legality.
3. The original illegal transaction was complete prior to the time defendant perpetrated upon plaintiff the fraud by which he obtained the possession of the ticket, and defendant is in no better attitude than a stranger to that transaction would be. Therefore, he must be re-

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garded as having received to the use of plaintiff the money he collected upon the ticket he had procured from plaintiff by fraud, and the mere fact that the money received was a prize in a lottery, drawn by a ticket purchased in violation of law, does not prevent plaintiff from recovering. (Story on Contracts, 4th ed., vol. 1, sec. 622; Farmer v. Russell, *et al.*, 1 B. & P., 295; Armstrong v. Toler, 11 Wheat., 258; Willson v. Owen, 30 Mich., 474; Rothrock v. Perkinson, 61 Ind., 39.)

4. If the connection of defendant with the original sale is to be considered, there is still no obstacle to a recovery. There is a difference between enforcing illegal contracts, and asserting title to money which has arisen from them. (Brooks v. Martin, 2 Wall., 70; Catts v. Phalen, 2 How., 376.)
5. The parties were not in *pari delicto* even in the original transaction, for he who offers a lottery ticket for sale, and thus tempts others to buy, is guilty of a greater wrong than he who buys, and under such circumstances relief may be granted. (Harper v. Harper, 85 Ky., 165; Anderson v. Meredith, 82 Ky., 571.)

ALLEN & HUGHES OF COUNSEL ON SAME SIDE.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Richardson, the appellee, was the owner and holder, by purchase from Martin, the appellant, of four tickets in the Little Louisiana Lottery concern. Among them was ticket No. 93,262.

The drawing was fixed for January 14, 1890, and on the 15th or 16th of that month Martin informed Richardson that it had been postponed. He then induced him to surrender his four tickets and accept one in the Big Louisiana Lottery, saying that he had let him have these four tickets by mistake, that they belonged to another person, who was demanding them. As a matter of fact the drawing had not been postponed, and the ticket numbered as above stated had drawn a prize of three thousand seven hundred and fifty dollars. These facts were known to the appellant and not to the appellee. Thereafter the appel-

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lant presented the ticket to the lottery concern and received the prize. Refusing to account to the appellee for it, he was sued, and in the lower court, after the verdict of a jury, judgment for the sum of three thousand seven hundred and fifty dollars was rendered against him, and from which he appeals. He does not bring up the evidence, and hence the only question is as to the sufficiency of the pleadings to support the verdict and judgment. The action was simply one for money had and received. The defendant collected that which belonged to the plaintiff, and the law implied a contract to pay it over to him. The contract which the law raised between them was not founded on the purchase or sale of a lottery ticket, but on the obligation to refund the money which had been procured and received by falsehood and fraud. It is true the plaintiff alleges that he bought the ticket from the defendant, and that it was one in the Little Louisiana Lottery, but he does not state where he bought it, and there is nothing in the petition to show that the lottery was unauthorized by law to transact such business. Hence the demurrer was properly overruled.

The answer denied that the plaintiff had ever owned or held the ticket numbered 93,262, or that the defendant ever delivered said ticket to the plaintiff, or that such ticket was obtained by defendant from the plaintiff in any way, or that he made the representations complained of.

Then follows a statement in the answer of how the plaintiff and defendant had exchanged a dollar ticket in the Big Louisiana Lottery for four twenty-five cent

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tickets in the Little Louisiana Lottery, and he disclaims any knowledge at the time of any of the tickets having drawn prizes. He avers that the Little Louisiana Lottery is located and operated in California, and is not licensed or authorized by the laws of California or other States to carry on that business; nor is either of said concerns authorized or licensed to carry on such business, or sell or dispose of tickets or prizes by any law or statute of this State; that both plaintiff and defendant resided in this State at the time of the purchase by plaintiff of the tickets, and at the time of their procurement and exchange *as aforesaid*, and all *said* acts and transactions were had and done in Union county, Kentucky.

It will be observed that it is nowhere alleged that plaintiff bought ticket No. 93,262 in Kentucky, or that he exchanged that particular ticket with the defendant in Kentucky. The transactions set up by the defendant in his answer as having occurred in Union county, Kentucky, necessarily excluded those with reference to this particular ticket, because the defendant expressly and unreservedly denied that plaintiff ever held this ticket, or that he ever obtained it from him in any way. Moreover, the plaintiff, by reply, denied that the Little Louisiana Lottery was not licensed or authorized by law to carry on such business; and therefore, as every presumption must be indulged in necessary to support the judgment, we must assume, in the absence of anything to the contrary, that this purchase or exchange of ticket No. 93,262 occurred in some place where it was legal and lawful to purchase it or exchange it, and that the Little Louisiana Lot-

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tery was an institution legally licensed to carry on its business. If the evidence were before us, a different state of case might be shown, but the verdict was for the plaintiff, and presumably sustained by the proof. And moreover, as announced in all such cases, every presumption is in favor of the legality of the transaction. (Bibb, &c., v. Miller, &c., 11 Bush, 306.) Here, then, we have a case where a party holds a ticket, the value of which does not depend on any chance, or its payment on the voluntary action of the company, and the legal obtention, title and ownership of which is not called in question, or tainted with any sort of illegality. It is fraudulently obtained from the possession of its rightful owner, and we can see no reason why recovery may not be had. Such, indeed, would seem to be the case if the purchase or sale were shown to have occurred in Kentucky. This is not an action on a contract of sale or purchase of a lottery ticket. The transaction out of which the suit springs, and which forms its sole basis, is subsequent to any alleged illegal act, and wholly disconnected with it.

In *Armstrong v. Toler*, 11 Wheat., 258, Chief Justice Marshall approved the opinion of the lower court, which was to the effect "that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." And Toler was allowed to recover of Armstrong money which he had paid for Armstrong on account of goods known by both parties to have been imported contrary to law.

In *Catts v. Phalen, &c.*, 2 How., 376, Catts was employed to draw out the tickets. He had a confederate to buy a certain ticket, and before inserting his hand in the lottery wheel he concealed in the cuff of his coat certain false and fraudulent tickets, which he managed to slip between his fingers, and then drawing out his hand produced the false ticket. When sued for the money received on the tickets so procured, he relied on the admitted illegality of the lottery drawing.

The Supreme Court said: "Phalen & Morris had in their possession twelve thousand five hundred dollars, either in their own right or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them. The defendant claimed and received it, by false and fraudulent pretenses, as morally criminal as by larceny, forgery or perjury; and the only question before us is whether he can retain it by any principle or rule of law."

"To state," says the court, "is to decide such a case."

"The principle of illegal contracts is" (see *Story on Conflict of Laws*, sections 248, 249), "after the illegal act is done, if the new contract is wholly unconnected with the illegal act, and is founded on a new consideration, and is not a part of the original scheme, although it may be known to the party with whom the contract is made, it will make no difference that such new and independent contracts are made with the person who is the contractor or conductor of the original illegal act, if it is wholly disconnected therefrom."

So in *Story on Contracts*, section 760, it is said:

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"If an act in violation of either statute or common law be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid."

Instead of an "agreement" between the parties, founded upon alleged illegal acts, we have in this case an implied obligation raised by law to refund moneys fraudulently received and withheld. For other authorities to the same effect, see *Farmer v. Russell*, 1 B. & P., 295; *Willson v. Owens*, 30 Mich., 474; *Rothrock v. Perkinson*, 61 Ind., 39.

The Little Louisiana Lottery concern was, under the pleadings in this case, an institution operated under lawful authority, and the defendant, in presenting the ticket in question, and in collecting the plaintiff's money, may be regarded as acting as his agent, and as collecting for his use. The law implies an obligation to refund the money, which is subsequent to and disconnected with the alleged illegal acts of buying, selling or exchanging the tickets.

Judgment affirmed.

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Louisville, &c., R. Co. v. Schick.

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## CASE 28—PETITION ORDINARY—MARCH 18.

## Louisville, &amp;c., R. Co. v. Schick.

## APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **SENDING JURY TO VIEW PLACE OF ACCIDENT.**—A jury may, as provided by section 818 of the Civil Code, be sent by the court, even after a case has been submitted to them, to view the place where any material fact occurred.
2. **RAILROADS—FAILURE TO HAVE EITHER GATE OR WATCHMAN AT CROSSING.**—Where the view at a railroad crossing in a city was obstructed by a cut, fences, etc., the failure of the railroad company to have either a gate or a watchman at the crossing was negligence, and it would have been proper for the court to so instruct the jury.
3. **FAILURE TO INDEX TRANSCRIPT.**—The transcript is condemned for want of a proper index.

## THOMAS W. BULLITT AND JAMES QUARLES FOR APPELLANT.

1. It was error to send the jury to view the premises after the case was finally submitted to them, the information received by the view being evidence. (Civil Code, secs. 818, 819, 821; *City of Topeka v. Martineau*, 5 L. R. A., 775; *People v. Bush*, 68 Cal., 623; *Burton v. State*, 30 Ark., 328; *Railroad Co. v. Dunlap*, 47 Mich., 456; *State v. Bertin*, 24 La. An., 46; *Eastwood v. People*, 3 Parke Cv. Cas., 25; *Ortman v. Railway Co.*, 32 Kan., 419; *Washburn v. Railroad Co.*, 59 Wis., 364; *Thompson on Trials*, sec. 898.)

It is the right of a party to have the court instruct the jury as to how they shall regard information obtained from a view, whether as evidence or not as evidence. (*Close v. Samm*, 27 Ia., 508; *Heady v. Turnpike Co.*, 52 Ind., 117; *Washburn v. R. R. Co.*, 59 Wis., 364; *Wright v. Carpenter*, 49 Cal., 609; *Brakken v. Ry. Co.*, 29 Minn., 41; *Topeka v. Martineau*, 5 L. R. Ann., 775.)

And as the Code (subsec. 5, sec. 817) requires instructions to be given before the argument of counsel, the view should have been ordered before the argument.

The jury viewed the premises more than a year after the accident happened, and the parties should have had an opportunity to inform the jury that the premises were not in the same condition they were in at the time of the accident. (*Morton v. Smith*, 48 Wis., 270.)

2. The court erred in refusing to restrain counsel from commenting on matters not in evidence. (*Ferguson v. State*, 49 Ind., 38; *Hoxie v. Insurance Co.*, 33 Conn., 471; *Balt. & Ohio R. Co. v. Boyd*, 10 Atl. Rep., 315; *Tucker v. Henniker*, 41 N. H., 317.)



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3. It was error to permit counsel for plaintiff to ask the trainmen whether or not they were running "under orders," and to prove by them that they were running without orders. (*Dolfinger v. Fishback*, 12 Bush, 474.)

•O'NEAL, PHELPS AND PRYOR FOR APPELLEES.

1. This was a case of willful neglect, and a verdict for twelve thousand dollars is not excessive. (*McLeod v. Ginther*, 80 Ky, 408; *L. & N. R. Co. v. Shirell, &c.*, 18 Ky. Law Rep., 902.)
2. Where a new trial is sought on account of the misconduct of counsel, the ground must be sustained by affidavits showing its truth. (Civil Code, sec. 340, subsec. 2; *Idem*, sec 348.)
3. The question of allowing the view and the time at which it shall be allowed are submitted to the discretion of the trial judge. (Civil Code, sec. 318; *Thompson on Trials*, secs. 888 908.)

Therefore, appellant, in order to obtain a reversal, must show not only an abuse of the discretion, but an *affirmative, direct* wrong, and injustice to him by reason thereof. (*Galena R. Co. v. Haslem*, 78 Ill., 494; *Boardman v. Fire Ins. Co.*, 54 Wis., 366; *Clayton v. Chicago R'y Co.*, 77 Ia., 289; *Baltimore R. Co. v. Polly Woods Co.*, 14 Gratt. (Va.), 470.)

•CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

Wm. Schick, husband of the appellee, resided in Jefferson county, a short distance from the city of Louisville. On the 29th of July, 1883, he visited Louisville in a jersey wagon, and after finishing the business that took him to the city, he started home, taking Mrs. Becker, wife of his neighbor, and Mr. Phister, another neighbor, in the wagon to ride home with him. As they approached the place where the appellant's trains cross Eighteenth street in the city limits, they received warning, by the customary signals, of the approach of a train of cars. They stopped and awaited the passage of said train. And immediately after the said train had passed, Wm. Schick attempted to cross the track with the jersey wagon and party in it, but before he could cross the

track another locomotive which was following close upon the first train and running backward at a rapid rate, struck the wagon and knocked it from thirty-five to fifty yards, killing Schick and Mrs. Becker and injuring Phister. The appellee, widow of William Schick, brings this suit for damages, and the trial resulted in a verdict and judgment for twelve thousand dollars in her favor.

The evidence before the jury authorized them to believe that said locomotive did not give any notice that it was approaching the crossing by blowing its whistle or by ringing its bell or otherwise, until it was almost on the jersey wagon, and it was then too late for Schick and party to escape being struck. The evidence also authorized the jury to believe that, owing to some obstructions, as a cut, high fence, &c., Schick and party could not see the approach of the locomotive. It also appears that no gate or watchman was kept at the crossing. From the facts and circumstances in evidence, the jury had a right to believe that the deceased came to his death by the willful neglect of the appellant.

It appears that after the case had been given to the jury, and they had gone to their room to consider their verdict, they returned into the court-room and asked permission to visit the place of the accident in order to view the place themselves. The request was granted, and they were conducted to the place, and did take a view of it. There is no objection made to the manner in which this was done, nor is there any complaint as to the misconduct of the jury. The only objection urged here is, that

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the court, after the jury had gone to their room to consult of their verdict, had no right to grant the request.

Section 318 of the Civil Code provides: "Whenever, in the opinion of the court, it is proper for the jury to have a view of real estate, which is the subject of litigation, or the place in which any material fact occurred, it may order the jury to be conducted in a body, under charge of an officer, to the place, which shall be shown them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial." Section 119 of said Code relates to the disposition to be made of the jury after the case has been finally submitted to them. Section 321 provides: "After the jury have retired for deliberation, if there be disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of the parties, or after notice to the parties or their counsel."

Counsel contend that the two latter sections control section 318, so as to limit the right of the court to order a view not later than the conclusion of the evidence and argument, but when the jury have taken the case to their room to consider of their verdict, they have no right to receive any further evidence, unless when they disagree as to some part of the evidence that has been submitted to them, then they

may be conducted into court, and in the hearing of the parties or their counsel, or after an opportunity has been given them to hear, be informed by the court, or by the witnesses themselves, as to the point of disagreement; and as the view of the place is evidence not introduced before the jury, they can not be allowed, after they have retired to their room to consider of their verdict, to make the view, because they would be receiving evidence not theretofore before them.

We agree with counsel that the place appearing on the view is evidence intended to explain, modify, corroborate or contradict the recollection of witnesses as to it. And we think that under section 318 the court is unlimited as to the time of allowing the view, for as that section contains no limitation as to time, the court has the right to order the view at any time during the investigation of the case by the jury. (See Thompson on Trials, section 908.)

We also think the other sections *supra* do not limit section 318. But if they do, we think that section 321 expressly authorizes the course pursued by the court, for said section provides that if the jury disagree as to the evidence, they may be taken into the court-room and be satisfied as to it. Now the witnesses had testified about the place, its location and condition, which was an important fact to be ascertained in order to determine the question of negligence and its degree. The place and its condition were thus before the jury all the time in the nature of evidence upon the subject of the appellant's negligence. The jury, it seems, could not take an in-

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telligent view of this place from the evidence of the witnesses concerning it, and disagreeing as to said evidence, they asked the court to let them view the place itself as an object lesson, correcting, explaining or contradicting the verbal testimony in that regard.

We think that the sections *supra* do not limit section 318; but if we are mistaken in this, we think the action of the court is in harmony with section 321.

Counsel for the appellant also object to instruction No. 5, relating to willful negligence. That instruction is more favorable to the appellant than the law justifies. The appellant had no gate erected at said crossing, nor any watchman there to warn persons that they might be in danger of being hurt by an approaching train. The view, by reason of the cut, fences, &c., was obstructed. It seems to us, therefore, especially in view of the fact of no gate and no watchman at the crossing in a city like Louisville, and on the street described, an instruction saying that such failure was negligence would have been proper.

We see no injury to the rights of the appellant in the refusal of the court to stop counsel for the appellee in the course of the argument indulged in by him.

There is no full index to the record of this case; there is no index to the evidence, nor to the instructions, and what index there is is to be found in about the middle of the record. There is no compliance with the law in regard to indexing. The record is not properly indexed, and must be and is condemned.

The judgment is affirmed.

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CASE 20—PETITION ORDINARY—MARCH 18.

## Howard Insurance Co. v. Owen's Admr'x.

94	197
100	36
94	197
118	628
118	627

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **INSURANCE—AUTHORITY OF AGENT.**—The possession by an insurance agent of blank policies, signed by the president and secretary of the company, afforded evidence of his general agency sufficient to justify a person to make a contract of insurance with him, and to accept a policy delivered by him.
2. **THE POWER OF AN AGENT CAN NOT BE LIMITED BY SPECIAL PRIVATE INSTRUCTIONS** so as to affect a contract of insurance, unless the insured had notice, or there is something in the nature of the business or circumstances of the case to indicate, that the agent acted under such special instructions.
3. **AUTHORITY TO INSURE PROPERTY IN "VICINITY" OF CITY.**—Where an insurance agent was empowered to make contracts of insurance upon property in a certain city and "vicinity," if there was any doubt as to the power of the agent to insure property in a village ten miles distant from the city named, it would be removed by the conduct of the insurance company in sanctioning contracts insuring other property in that village.
4. **A VERBAL CONTRACT TO ISSUE A POLICY IS VALID AND ENFORCEABLE,** and if the insured property is destroyed by fire before the issue of the policy under the contract a court of equity having jurisdiction to decree specific performance will, to avoid unnecessary circuitry, adjudge damages just as if the policy had been executed, and an action had been brought on it for loss of the thing insured.
5. **SAME—WAIVER.**—The making of a written application for insurance was not a waiver by the applicant of his right to a policy under a verbal contract previously made with the agent through whom the application was forwarded, it being expressly agreed by the agent that the only purpose of the application was to describe the property. Therefore, the fact that the application was rejected by the company, and the agent instructed not to issue a policy, does not affect the right of the insured to recover upon a policy delivered by the agent in express violation of that instruction, as the agent, in delivering the policy, did only what a court of equity would have compelled the company to do.

AUGUSTUS E. WILLSON FOR APPELLANT.

1. Prior verbal negotiations were merged in written application. (*Castleman v. So. Mu. Life Ins. Co.*, 14 Bush, 197.)

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2. Parol testimony was inadmissible to modify the application. (*Insurance Co. v. Holzkraft*, 58 Ill., 516; *Castleman v. So. Mu. Life Ins. Co.*, 14 Bush, 197.)
3. Agent had no power to insure after fire. (*Stebbins v. Lancaster Ins. Co.*, 60 N. H., 65; *Bentley v. Columbia, &c.*, 17 N. Y., 421.)
4. Declarations of agent after fire were inadmissible. (*Kock v. Godshaw*, 12 Bush, 320; *Roberts v. Burke*, Litt., Sel. Cas., 411; *Clay v. Swett*, 4 Bibb., 253; *Murphy v. May*, 9 Bush, 36; *Davis v. Whitesides*, 9 Dana, 177; *McLeod v. Ginther*, 80 Ky., 403; *Walker v. Ins. Co.*, 51 Ia., 679-82.)
5. Owen's offer or application imposed no obligation on the company until accepted. (*St. Louis Ins. Co. v. Kennedy*, 6 Bush, 450-5; *Ins. Co. v. Young*, 23 Wall., 85-106; *Strohn v. Hartford, &c., Co.*, 37 Wis., 629; *Trustees v. Bushnell, &c.*, 28 N. Y., 153; *Neville v. Ins. Co.*, 17 Ohio, 452-60; *Myer v. Keystone, &c., Co.*, 27 Pa. St., 268.)
6. Burden was on plaintiff to prove the contract and agent's authority. (*Brown v. Mass. Ins. Co.*, 12 Ins. Law J., 208-13; *Hays v. Lynn*, 7 Watts, 524; *Moore v. Patterson*, 28 Pa., 505; *Underwriters v. George*, 97 Pa., 236; *Am. Life v. Schulz*, 82 Pa., 46.)
7. Delay in accepting could not make a contract of the proposal or application. (*Ins. Co. v. Johnson*, 23 Pa. St., (11 Hains, 72.)
8. Analogous cases: *Harp v. Granger's Co*, 49 Md., 307; *Walker v. Farmer's Ins. Co.*, 51 Ia., 679; *Real, &c., v. Rossie*, 1 Gray, 336.)

## WM. LINDSAY OF COUNSEL ON SAME SIDE.

## R. H. CUNNINGHAM, BULLITT &amp; SHIELD FOR APPELLEES.

1. Contracts "to insure" must be enforced. (25 Connecticut, 207; 5 Pa. St., 339; 17 Iowa 276; 27 Barbour, 312; 4 Cowan (N. Y.), 645; 2 Deutch, N. J., 268 and 541; 3 Deutch, N. J., 645; 55 N. H., 835; 5 Ind., 96; 76 Mo., 371; 19 Howard, U. S., 318; 23 Wend., 18; 6 Bush, 455; 7 Bush, 81; 20 Wall., 560; May on Insurance; Lawson's Rights, Remedies and Practice, vol. 5, pages 3496-7; May on Insurance, 3d edition, secs. 14 to 23 and 44 and 45.)
2. Insurance may be by parol. (3 Am. Rep. (note), 305; Wood on Insurance, 4; 96 Am. Dec., 83; 10 Am. Rep. (note), 205; 19 Howard, 318; 77 Am. Dec., 419; 19 Am. Rep. (note), 309; 7 Bush, 86; 99 Am. Dec., 145; 25 Am. Rep. (note), 93; 9 Howard, 390; 39 Am. Dec., 542; 17 Am. Rep., 322; 94 U. S., 574; 11 Am. Rep., 125; 20 Wallace, 560; May on Insurance, 3d edition, sec. 43 and seq.)
3. Agent may decide what company insures and enter in books. (Wood, 8, note, & 25.)
4. Agent may bind company though he has no authority to make out policy. (Wood, 9; May, 57.)
5. If mistake in the policy is the fault of the agent, the company is bound. (13 Wallace, 407.)

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6. Oral evidence admissible to prove it. (13 Wallace, 230-1.)
7. Where acts of agent will bind his principal, his representations and declarations and admissions will also bind him if made at the same time, and constituting part of the *res gestæ*. (1st Greenleaf, "Evidence," 118; Story, Agency, 134, 137; 21 Howard, 164.)
8. May prove that printed instructions to agent on application was not read by or to, or explained to or understood by, assured, and he is not bound thereby. (Adams Express Co. v. Nock, 2 Duv., 562); Trainor v. Morrison, 57 Am. Rep., 790, and Cases Cited.)
9. Agent's contracts out of his "vicinity" bind company. (May, 130.)
10. Authority to accept risks, issue policies, &c., make general agent, and possession of blank policies is evidence of agency. (May, 126.)
11. Application generally. (May, 120.)
12. Evidence of dead witness. (1st Greenleaf, 165-6.)  
Deposition of dead witness. (1st Greenleaf, 516.)
13. Difference between "of" and "for" insurance. (Wood, 10 and 11; 6 Bush, 450.)
14. Agent may issue policy after loss. (Wood, 10; 20 Wallace, 560; 7 Bush, 81; May, secs. 45, 453, 44 and 128.)
15. Agent bound to deliver policy after loss. (Wood, 81.)
16. Secret limitations of agent's power do not prevent third persons from dealing with him to the full extent of his apparent power. (Wood, 390; 13 Wallace, 222; 4 Cowan, N. Y., 645.)
17. By issuing policies on prohibited risks agent may bind the company to the assured. (Wood, 398; 6 Bush, 180.)
18. Meaning of word "vicinity." (May, sec. 130.)
19. Agent's knowledge of the facts binds the company, although the assured innocently made misrepresentations. (Wood, 400; 13 Wallace, 222.)
20. Where agent knew powder and petroleum were kept, and permission to keep same was omitted from policy by his fault, keeping them in usual quantities did not avoid policy. (Mobile Fire Ins. Co. v. Miller, 58 Ga., 420; Wood, sec. 400; May, secs. 130 and 131.)
21. When an agent knows facts of the risk (coal oil, &c.), and fails to provide therefor, his knowledge is knowledge of the company, and it can not set up such facts as defense. (Wood, 403, p. 678; 16 Ben Monroe, 242; May, 180.)

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT

February 24, 1884, appellee, J. V. Owen, residing and having a store-house in the village of Corydon, Henderson county, communicated by telephone with R. G. Adams, agent, at the city of Henderson, ten



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miles distant, of appellant, the Howard Insurance Company, about obtaining a policy of insurance on his building. And it was on that occasion agreed by Adams to insure it for one year for the amount and at the consideration fixed upon by them, Owen being informed by Adams, in substance, and relying upon the assurance, that the contract was made and his store-house then insured by the Howard Insurance Company. But about February 29, Adams requested Owen to make a formal application to the company for the insurance, and sent the blank for that purpose by his special solicitor, Hardwick; though at the same time Owen was assured his right under the verbal contract should not be thereby impaired.

Owen did, as requested, fill up and sign the application, showing situation and character of his house, and delivered or sent it to Adams, who forwarded it to the general manager of the company at Toledo, O.

March 6 Adams made entry of the verbal contract in the policy register kept by him for such purpose, of which he notified Owen. And March 13 he again notified him his property was insured, and also that a written policy, made out in pursuance of the verbal contract, would be sent to him as soon as a supply of blanks, of which he then had none, was received from headquarters of the company.

March 15, Adams having received the policy already signed in blank by the president and secretary of the company, filled up and countersigned it himself as agent. But March 15, at night, after execution, but prior to delivery, of the policy to Owen, the store-house was totally destroyed by fire.

It appears the general manager at Toledo, upon receiving the application made February 29, rejected it, and by letter dated and mailed March 12 to Adams at Henderson, notified him of the rejection. Nevertheless, March 17, Adams accepted from Owen the amount of premium previously agreed upon, though not before paid, and delivered to him the policy running from March 6 for one year; and this action was brought to recover on it the amount for which it is alleged the store-house was insured.

On the former appeal, this being the second, the single question was as to sufficiency of the plea of limitation sustained by the lower, though decided adverse to defendant by this, court. But we are now required to revise a judgment in favor of plaintiff for amount sued for.

The statute of frauds has no application to the case, nor does the petition contain two distinct causes of action, as counsel argues. In *Security Fund Ins. Co. v. Kentucky Marine Ins. Co.*, 7 Bush, 81, it was held by this court, in accordance with established doctrine, that "a contract to issue a policy as an executory agreement to insure may be binding without any written memorial of it;" and further, that "a court of equity having jurisdiction for specific enforcement, would, to avoid unnecessary circuitry, adjudge the damages just as if a policy had been executed, and an action had been brought on it for loss of the thing thereby insured."

This action is not, however, based at all upon the verbal agreement, but alone upon the policy executed and delivered in pursuance of it; and evidence in

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regard to terms of that agreement, and circumstances under which it was made, would be neither necessary or pertinent, except for the purpose of determining the decisive question, whether Owen was legally entitled to the policy, and Adams had authority and was bound to deliver it at the time he did so.

On the trial the jury was instructed that "Adams was general agent of defendant for the purpose of making contracts of insurance and issuing policies of insurance for the defendant against loss or damage by fire upon property situated in Henderson, Kentucky, and *vicinity*, subject to the limitations contained in the paper entitled Instructions for Agents, filed with deposition of Adams, and read in evidence."

It seems to us the defendant had no cause to complain of that instruction, because Adams was, in terms of the paper referred to, appointed its agent, and empowered to make contracts of insurance and to issue policies of insurance. Besides, his possession of blank policies, signed by the president and secretary, afforded evidence of his general agency sufficient to justify a person making a contract of insurance with him, and in accepting and treating as valid and enforceable a policy issued and delivered by him. The qualifying clause of that instruction would, however, have been prejudicial to plaintiff, if not explained by other instructions, which seems to have been done; for the power of an agent can not be limited by special private instructions so as to affect a contract of insurance, unless the insured had notice, or there is something in the nature of the business or circumstances of the case to indicate, the

agent acted under such special instructions. (May on Insurance, section 126.)

Very many exceptions to rulings at the trial on competency of evidence were taken, and are now urged as reasons for reversal of the judgment; but we need not refer to them in detail, because satisfied, after examining the bill of exceptions and evidence, that the facts we have recited were beyond question established by evidence entirely competent; and as these facts clearly involve an agreement between Owen and Adams for insurance by defendant of the store-house in question, and for delivery of a policy of insurance, and also authority of Adams to make the contract and deliver the policy, there necessarily follows the right of Owen to recover the amount at which the property was agreed to be insured, unless he did some subsequent act equivalent to a waiver or estoppel of his right to the policy, or acted in bad faith or collusion with Adams to defraud the Howard Insurance Company; for if he was, in virtue of the parol agreement, entitled to the policy, he was not deprived of that right; nor was the company released from its contract to deliver it by reason of intervening destruction of the property insured. A question is, however, made as to the meaning and comprehensiveness of the word *vicinity* used in the letter of Adams' appointment as agent; but it seems to us if there was any doubt about authority of Adams as agent to make contracts for insurance of property in the village of Corydon, it would be removed by the conduct of defendant sanctioning contracts for insuring other property in that place, which appears from evidence in this case was done.

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Although ordinarily an application for insurance would tend strongly to show the contract to insure was not completed, and that the right of a company to decline making it still existed, yet in this case the evidence is that it was distinctly agreed by Adams the application was intended simply as description of the property, and would not impair Owen's right under the previous parol agreement, nor release the company from its obligation thereby incurred; and if the application was made by Owen under such circumstances and upon such assurance, we do not see how that act can be now construed as a waiver of his right to the policy already acquired by the parol contract, or as a release of the company. It appears that the store-house of Owen was in a range of frame buildings, and Adams was, in his letter of instructions, forbidden to insure property so situated; and, therefore, the general manager probably would, if informed of the fact pending negotiations between Adams and Owen, have prohibited consummation of the contract, as he did reject the application when received by him. But it appears Adams was acquainted with the condition and situation of the property at the time he agreed to insure it, and as the company gave him authority to make the contract of insurance and for delivering the policy, it should suffer for any apparent or real breach of trust by its agent, and not Owen, the insured, who relied and acted upon the faith of the agreement. There is no evidence that Owen had notice of such restriction or limitation of the authority of Adams as agent, or that he acted in bad faith in any respect whatever, and the jury so found.

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Walker, &c., v. Yowell's Adm'r.

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It appears that the letter of the general manager rejecting the application was received by Adams before delivery of the policy, but after the property was destroyed. But if defendant was legally bound by agreement of its agent to deliver the policy, and Owen's right to it had become vested before destruction of the property insured, then Adams did no more in delivering it, March 17th, than a court of equity would have compelled the company to do.

Whether Owen was entitled to the policy, and as a consequence the right to recover on it, was a question to be determined by the jury under instructions of the court, which appear to us to fully and accurately cover every issue; and as there is scarcely any room for controversy about any material fact in the case, the verdict of the jury in favor of plaintiff was inevitable.

Judgment affirmed.

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CASE 30—PETITION EQUITY—MARCH 22.

Walker, &c., v. Yowell's Adm'r.

94	205
104	45

## APPEAL FROM ANDERSON CIRCUIT COURT.

**VENUE OF ACTION FOR SALE OF LAND OF DECEDENT.**—An action for the sale of land belonging to the estate of a deceased person must be brought in the county where the personal representative qualified, if it involves a settlement of the estate and payment of debts, or distribution or partition among the heirs, although the land lies in another county.

**NELMS & BICKERS FOR APPELLANTS.**

Brief withdrawn.

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Walker, &c., v. Yowell's Adm'r.

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**PHIL B. THOMPSON, SR., FOR APPELLEE.**

The action of the lower court in sustaining a demurrer to the petition for want of jurisdiction was proper. (Civil Code, sec. 62, subsecs. 1, 2; 2 Bush, 49; *Idem*, 126; 7 Bush, 46.)

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

This action was brought by the administrator and heirs of Emily J. Yowell, in the Anderson Circuit Court, for a sale of a tract of land lying in Mercer county, Ky., belonging to said Emily, and for a division of the proceeds, &c.

Section 66, Civil Code, reads: "An action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale for the payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified." The question is: Does the Anderson or Mercer Circuit Court have jurisdiction to order the sale? Upon that subject it seems to us that if the action involves a settlement of the estate and the payment of debts, or distribution or partition among the heirs, the action in such case should be brought in the county where the deceased person's representative qualified; for the reason that in all such actions the payment of debts is involved, and the administrator has the right to be heard as to them in the county in which he qualified.

The judgment sustaining the demurrer to the petition is reversed, and the case is remanded with directions to proceed according to this opinion.

Henderson, &amp;c., v. Perkins.

CASE 31—PETITION EQUITY—MARCH 25.

## Henderson, &amp;c., v. Perkins.

APPEAL FROM EDMONSON CIRCUIT COURT.

94	207
114	874
94	207
119	175
94	207
1133	577

1. **VENUE OF ACTION TO ENFORCE CONTRACT FOR SALE OF LAND.**—While an action to enforce a contract for the sale of land is transitory, yet where the enforcement involves a sale of the land to satisfy a lien thereon, the action is localized, and must be brought in the county where the land lies.
2. **STATUTE OF FRAUDS—DESCRIPTION OF LAND.**—Where a contract for the sale of land described the vendor as “of Rocky Hill Station, Ky.,” and the property sold as “my home-place and store-house,” there was a sufficient memorandum of the contract to take it out of the statute of frauds.
3. **VENDOR AND VENDEE—DEFECTS IN TITLE CURED.**—While possession was to be given on a certain day, yet as the deed was not to be made until the payment of the balance of the purchase money, and there was no tender of the money, the vendee can not resist enforcement of the contract upon the ground that the title was defective at the time fixed for the delivery of possession, the defects having since been cured.
4. **ADVERSE POSSESSION—GRANT PRESUMED.**—Although no grant from the Commonwealth is shown, yet as the chain of title begins in 1835, and the vendor and those under whom he claims have had continuous adverse possession for at least forty years, a grant from the Commonwealth will be presumed.
5. **BURNING OF HOUSE BEFORE TIME FOR DELIVERY OF POSSESSION.**—The fact that the store-house purchased by the defendant was burned between the date of the contract and the time fixed for delivery of possession, does not relieve the defendant from obligation to comply with his contract.
6. **IT WAS ERROR TO ORDER A CONVEYANCE BY THE WIFE** of the vendee of her dower in lands which her husband contracted to convey in part payment for the property purchased from plaintiff, and for this error the judgment must be reversed.

LEWIS McQUOWN FOR APPELLANTS.

1. The Edmonson court had no jurisdiction. The *cause of action* is the demand for specific performance. The alleged lien is only an *incident*. (Kendrick v. Wheatley, 8 Dana, 34; Lewis v. Morton, 5 Mon., 2.)
2. The writing sued on is not sufficient under the Statute of Frauds.



## Henderson, &amp;c., v. Perkins.

There is no description or identification of the property sold Henderson. (*Madeira v. Hopkins*, 12 B. M., 595.)

3. The title tendered by appellee is not sufficient. A court of equity will not force a doubtful title upon a purchaser. (*Morgan v. Morgan*, 2 Wheat., 290; *Hightower v. Smith*, 5 J. J. Mar., 544; *Bartlett v. Blanton*, 4 J. J. Mar., 429; *Lewis v. Herndon*, 8 Litt., 361; *Watts v. Waddle*, 6 Pet., 889; *Davis v. Dycus*, 7 Bush, 4; *Bodley v. McChord*, 4 J. J. Mar., 475; *Tevis v. Richardson*, 7 Mon., 664; *Dobbs v. Norcross*, 24 N. J. Eq., 327.)

There is no grant from the State; several of the deeds do not pass dower; others are not properly certified, and the deed to appellee shows the existence of a lien for about one thousand dollars. (*Hatcher v. Andrews*, 5 Bush, 565; *McDowell v. Prather*, 8 Bush, 61; *Miller v. Henshaw*, 4 Dana, 330; *Franklin v. Becker*, 11 Bush, 595; *Hynes v. Campbell*, 6 Mon., 287; *Bartlett v. Blanton*, 4 J. J. Mar., 428; *Beckwith v. Kowna*, 6 B. M., 222; *Taylor v. Bush*, 5 Mon., 88; *Tomlin v. McChord*, 5 J. J. Mar., 135.)

4. As time was of the essence of the contract, and appellee did not have title when he was bound to convey and deliver possession, it would not be equitable to decree specific performance, although the defects were afterwards cured. (3 *Parsons on Contracts* 384; *Walker v. Jeffries*, 1 Hare, 348; *Waterman on Spec. Perf.*, sec. 483; *Gale v. Archer*, 42 Barb. (N. Y.), 320.)
5. The appellant averred in his answer that the appellee did not have *any title at all*. This was sufficient to put appellee on an exhibition of his title. (*Logan v. Bull*, 78 Ky., 630.)
6. Appellee contracted and was bound to deliver possession of the store-house. If he is not in condition to comply, appellant should not be compelled to accept the tendered conveyance.
7. The evidence shows that appellee burned the store-house, and for that reason he is not entitled to specific performance.
8. It was error to require the appellant Joicey R. Henderson to join in the conveyance with her husband. (*Tevis v. Richardson*, 7 Mon., 660.)
9. Specific execution of a contract in equity is a matter of sound discretion in the court, and will not be decreed where it would work injustice. (1 *Story's Eq.*, sec. 769.)

## WARNER E. SETTLE AND EDWARD W. HINES FOR APPELLEE.

1. This was an action for the sale of real property under a lien, and, therefore, the action was properly brought in the county in which the property was situated. (Civil Code, sec. 62, subsec. 3; *Collins v. Park*, 93 Ky., 6.)
2. The description of the property in the contract is sufficient to satisfy the requirements of the Statute of Frauds. (*Ellis v. Deadman*, 4 Bibb, 467; *Winn v. Henry*, 84 Ky., 48.)

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3. After the lapse of forty years a grant from the State will be presumed. (Jarboe v. McAtee's heirs, 7 B. M. 280.)
4. After the great lapse of time the court will not presume that the wives of the grantors in the deeds exhibited are still living. (Jarboe v. McAtee's heirs, 7 B. M., 282.)
5. It would be inequitable to allow the vendee to insist that the title was not perfect at the time fixed for performance when a deed was then tendered and he made no objection to the title. (More v. Smedburgh, 8 Paige, Chy., 605.)
6. A lien for purchase money does not constitute such a defect in the title as entitles the vendee to a rescission. (Tapp, &c., v. Nock, 89 Ky., 419.)
7. The vendor did not assume the risk of the destruction of the store-house by fire. (Marks v. Tichenor, 85 Ky., 586.)
8. The title being subsequently made perfect, it is immaterial that the vendor was not able to make a good title at the time agreed on for performance, time not being of the essence of the contract. (Smith, &c., v. Cansler, 83 Ky., 367.)
9. The lapse of time may give perfect title. (Logan v. Bull, 78 Ky., 614.)

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant L. D. Henderson was the owner of a farm of one hundred and ten acres, situated in Barren county, Kentucky, and the appellee owned a store-house and lot at Rocky Hill Station, and lands adjoining to the extent of some fifty acres, situated in Edmonson county. By written contract of December 13, 1889, Perkins sold his property to Henderson in consideration of the sum of four thousand dollars and the latter's farm of one hundred and ten acres. One thousand dollars was to be paid down, and balance on February 25, 1890, when possession was mutually to be given, Perkins covenanting to make deed of general warranty when the purchase money was fully paid. Henderson paid the one thousand dollars down, and also an additional one thousand in a few weeks after the trade. On Jan-

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uary 31, 1889, the store-house burned, and the appellee, after unavailing effort to carry out the contract, brought this action against Henderson and his wife in the Edmonson Circuit Court to enforce the contract, and to that end asked that his lien for the remaining unpaid purchase money be enforced by a sale of the Edmonson county lands. He tendered a deed for the lands he had contracted to convey.

The defendants, having been summoned only in Barren county, pleaded to the jurisdiction, controverted the statements of the writing, set up that Perkins had no title in fee or otherwise to the land, and further, that the contract should not be enforced because Perkins had burned his store-house to get the insurance on his goods therein, or else it was burned by his negligence. The lower court sustained a demurrer to the plea of want of jurisdiction, and on hearing gave judgment for the enforcement of the contract, adjudged a sale of the Edmonson county lands for the unpaid purchase price, and adjudged that Henderson *and wife* should convey the Barren county lands to Perkins.

The grounds relied on by Henderson to reverse this judgment, are :

1. The Edmonson court had no jurisdiction.
2. The contract is within the statute of frauds.
3. Perkins had no title to the property.
4. He burned his store-house to get the insurance on the goods.
5. The judgment erroneously directs Henderson and his wife to convey the Barren county lands to Perkins.

On the subject of jurisdiction, it may be said that

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the general rule is, undoubtedly, that actions to enforce contracts or to rescind them are transitory and not local, yet, when the enforcement involves a sale of the land to satisfy a lien thereon, it has been the rule to regard section 62 of the Civil Code as localizing the action. That section provides that actions must be brought in the county in which the subject of the action, or some part thereof, is situated, \* \* for the sale of real property under a mortgage lien or other encumbrance or charge, except for debts of a decedent; and such was the precise question decided in *Collins v. Park*, 93 Ky., 6; *Ducker & Jones v. Gray*, 3 J. J. Mar., 163.

2. The writing evidencing the contract, and which was signed by the parties, is as follows: "Know all men by these presents, that I, W. C. Perkins, of Rocky Hill Station, Ky., have this day sold, and by these presents do sell my home place and store-house to L. D. Henderson, of Rocky Hill, Barren county, Ky., for and in consideration of four thousand dollars," &c., followed by a specific statement of the terms of the trade.

We think this a sufficient memorandum of the contract to take it out the statute. There was a partial execution of it, and the description of the land, although defective, was sufficiently full for easy identification. (*Ellis v. Deadman*, 4 Bibb; 467; *Hanly v. Blackford*, 1 Dana, 1.)

3. The answer alleges that on the 25th of February, when the deed was tendered him, the appellee did not have any title in fee or otherwise to any of the lands described; that the store-house had then been

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burned, and it was impossible to deliver said premises to him in accordance with the contract.

It will be observed that while possession was to be given on the 25th of February, the deed was not to be made until the payment of the balance of the purchase money. We may suppose these acts were to be cotemporaneous, and there was no tender of the money. The appellee, however, did have title, though it was defective, and as the defects have been cured, we do not perceive that the appellee has any ground of complaint on this behalf. It is quite evident that the cause of the appellant's hesitancy to comply with the contract was the fact that the storehouse had been burned, and from this loss we can not relieve him. There is no grant shown from the State, but the chain of title begins in 1835, and the appellee and those under whom he claims have had continuous adverse possession for at least forty years, and a grant from the Commonwealth will be presumed.

4. There is no evidence whatever tending to show that the appellee burned the house, or had any motive to do so, or that it was occasioned by his negligence.

But the wife was no party to the contract, and had she been, we do not see upon what principle the court could have adjudged a conveyance of her dower in the Barren county lands, and, as this was error, the judgment must be reversed, with directions to have it otherwise enforced.

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## CASE 32—PETITION EQUITY—MARCH 25.

## Croan, &amp;c. v. Phelps' Adm'r.

## APPEAL FROM BULLITT CIRCUIT COURT.

1. **INHERITANCE FROM BASTARD.**—The collateral kindred of the mother of a bastard can not inherit from the bastard.
2. **SAME**—Upon the death of a bastard without kindred who can lawfully inherit from him his widow takes the whole estate.

## CHARLES CARROLL FOR APPELLANTS.

Appellants are the maternal kindred of the intestate, and therefore they and not the widow inherit. (Gen. Stats., chap. 31, sec. 5; *Idem*, sub. sec., 9 of sec. 1; *Idem*, chap. 21, sec. 16; *Cooley, &c. v. Henry*, 5 Pick. (Mass.), 93; *Scroggin v. Allan*, 2 Dana, 362, dissenting opinion of Judge Underwood; *Jackson v. Jackson*, 78 Ky., 390; *Prochet's Adm'r v. Scherzer*, 82 Ky., 481; *Sutton v. Sutton*, 87 Ky., 216; *Bingham on Descent*, 481; *Schouler on Domestic Relations*, sec. 277.)

## J. W. CROAN ON SAME SIDE.

The estate of a bastard descends in the maternal line to the mother, and she being dead her legal representatives succeed to her right. (*Sutton v. Sutton*, 87 Ky., 217; Gen. Stats., chap. 31, sec. 1, subsec. 1-6; *Idem*, sec. 5; *Power v. Hafley*, 85 Ky., 671; *Drain v. Violet*, 2 Bush, 167; *McKannie v. Baskerville*, 7 S. W. Rep., 194; *Swanson v. Swanson*, 2 Swan, 459; *Ross v. Ross*, 129 Mass., 267; *Talbott v. Talbott*, 17 B. M., 1; *Webster's Dictionary*, words "legitimate," "inheritance," "kindred.")

## FAIRLEIGH &amp; STRAUS FOR APPELLEE.

The kindred of the mother of a bastard can not inherit from him. (*Schouler Dom. Rel.*, 3rd edition, sec. 277; Gen. Stats., chap. 31, sec. 5; *Sutton, &c., v. Sutton, &c.*, 87 Ky., 217; *Jackson v. Jackson*, 78 Ky., 390; *Allen v. Ramsey*, 1 Met., 685; *Berry v. Owen*, 5 Bush, 452; *Bemington v. Lewis*, 8 B. M., 606.)

And as the intestate in this case has no kindred upon whom the statute of descents casts the inheritance the widow takes. (Gen. Stats., chap. 31, sec. 1, subsec. 9.)

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Wesley Phelps, at quite an advanced age, died in-

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testate and without issue, the owner of a large estate in Bullitt county, Ky.

The proof is clear that he was the illegitimate son of Alice McDaniel, whose death preceded his some years. He left a widow who claims the entire property. It is also claimed by the descendants of the brothers and sisters of Phelps' mother Alice; and the sole question presented upon this appeal is who takes the property. The lower court gave it to the widow, or rather to her devisees and legatees, she having died after instituting this action.

The appellees base their claim to the estate under subsection 9, section 1, chapter 31 of the General Statutes, which provides that if there be neither paternal nor maternal kindred, the whole estate shall go to the husband or wife of the intestate. They say that by "kindred" is meant such as can lawfully inherit. The mother being dead and their being no legal father, and no provision for the transmission of inheritance from a bastard to collaterals, the appellees contend it is as if the paternal and maternal kindred were wholly extinct, and that the contingency arose upon which the widow became entitled to take the whole estate.

The appellants contend that under section 5 of the statute quoted, the mother, if living, would have taken, and that her brothers and sisters, or their descendants, must now take in her stead; that the intestate was capable, under the statute, of transmitting the estate to and through his mother on to them. That section is as follows:

"Bastards shall be capable of inheriting and trans-

mitting an inheritance on the part of or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

It is insisted that the expression "on the part of or to the mother" must be construed liberally and as meaning transmissibility of estate, not only "to" but through the mother, and on to her collateral kindred. In determining the meaning of these words and the proper legal exposition of the statute, we must keep in mind that by the rules of the common law a bastard had no inheritable blood, and could neither receive from nor transmit an inheritance to his father, mother, brothers or sisters. The Kentucky Statute of Descents of December, 1796, was an innovation on the common law, and was as follows: "Bastards also shall be capable of inheriting, or transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

This was a copy of the Virginia statute of 1787, and with reference to which the Supreme Court of the United States, in *Stevenson's Heirs v. Sullivant*, 5 Wheat., 255, said: "We understand it to be that they (bastards) shall share a capacity to take real estate by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants in like manner as if they were legitimate."

The expression "on the part of their mother" was not held to confer the right to inherit on the mother



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from her bastard child, but the whole effect of the section and this expression was simply to enable the bastard to take by inheritance from or through the mother in the direct line, and to pass that inheritance with the same directness to his own issue. And the illegitimate brothers in that case were denied the right to inherit from their legitimate brother. While *quasi* legitimates in some limited respects, they were nevertheless said to be bastards in all others, and as such could have neither father, brothers or sisters, and their inheritable blood was confined within the narrow limits of the very letter of the law. This restricted construction was followed by the Kentucky courts until the act of 1840, though not without a strong dissent in *Scroggin v. Allan*, 3 Dana, 363, decided in 1834. This act provided "that the mother shall be, and is hereby, rendered capable to inherit as heir or distributee of her bastard child, and brothers and sisters of the same mother, born out of wedlock, shall be capable to inherit and take by descent or distribution from each other as though born in wedlock, and as brothers and sisters of the whole blood." And notwithstanding the seeming generous intention of the statute to make the illegitimate child legitimate *ex parte materna* to all intents and purposes as though born in wedlock, yet in *Remington v. Lewis*, 8 B. Mon., 606, decided in 1848, the court used this language: "It is impossible, upon any admissible construction of the *language of the act*, to consider it as establishing a legal relationship for the purpose of inheritance between a bastard and any other of his natural relations but his *mother* and such other *illegitimate* issue as she may have."

"It does not operate to establish a right either in the illegitimate children to inherit from the legitimate, or in the legitimate children to inherit from the illegitimate."

"Under this construction," says the court, "the bastard has, in view of the law of descents, no brothers or sisters except the illegitimate children of the same mother, and *no other collateral kindred* who can take his estate as heirs; and upon his death without issue, without lineal maternal ancestor alive, and without brother or sister, the illegitimate issue of his mother, or their descendants, his wife, if he leave one, is his heir under the 14th section of the statute, and not the legitimate son of his mother."

If the legitimate son of the mother of the bastard can not inherit his estate through their common mother, how can the collateral kindred of the mother, in this case, hope to do so? It can not be contended that our statute is more liberal than that of 1840. Indeed it is only by a forced construction that the mother herself can be said to inherit from her bastard child. The plain act of 1840 conferring, for the first time, that right on her in its opening clause, thus: "That the mother shall be, and is hereby, rendered capable to inherit \* as heir \* of her bastard child," was not inserted in the Revised Statutes (1852) or the General Statutes (1873). Instead thereof, the old eighteenth section of the Kentucky Act of 1796, copied from the Virginia Act of 1787, was adopted with the interpolation of the words "or to," after the words "on the part of." And suppose we adopt the construction given this statute by the Su-

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preme Court of the United States in *Stevenson's Heirs v. Sullivant supra*, and followed by a majority of this court, in *Scroggin v. Allan*, above quoted, we would have this state of case: "Bastards shall be capable of taking real property by descent immediately or through their mother, or on the part of their mother, and transmitting that same estate without alteration to their own issue and to the mother." The old statutes were consistent and harmonious, simply empowering the bastard, though within narrow limits, to inherit property from his mother, which, under the common law, he could not do, and transmit the same to his own issue. Now, singularly enough, after so inheriting it he is permitted to transmit it "*to the mother*" from whom he has just inherited it!

The well-known legal meaning of the expression "on the part of the mother," as construed by the courts, must, therefore, be discarded, and it must be supposed that they were used in the statute in the sense of "*from the mother*," hence the meaning is as if the reading was: "Bastards shall be capable of inheriting and transmitting an inheritance from or to the mother." And even this solution is well nigh defeated by the rejection of the alternative "or" properly used in the old statute, and inserting the word "and" in the present one, thus requiring the same estate to be inherited and transmitted to or from the mother. However, the statute must be construed to mean that bastards shall be capable of inheriting from the mother, and of transmitting an inheritance to the mother, and so must be held to

embody, in substance, the provision of the acts of 1796 and of 1840, but certainly not to extend or broaden them. In the case of *Sutton v. Sutton*, 87 Ky., 217, some progress was made toward liberalizing this section, and there the legitimate children of a bastard take what he, if alive, would have taken from an illegitimate brother of the same mother—but it was done under the statute making bastards capable of inheriting and transmitting an inheritance on the part of each other, as if born in lawful wedlock of the same parents. There is no such statute in aid of the collateral kindred of the mother. In *Allen v. Ramsey's Heirs*, 1 Met., 635, and *Berry v. Owens' Heirs*, 5 Bush, 452, the right of the bastard to inherit from the mother's collateral kindred was very decisively negatived.

In *Jackson v. Jackson*, 78 Ky., 390, this court, through Judge Cofer, held that the bastard could not inherit through his mother from her ancestors. "It must be regarded," says the court, "as the settled law of this State that a bastard can not inherit from collaterals from whom his mother, if living, would have inherited, \* \* and it would seem to follow, as a necessary logical sequence, that he can not inherit from the ancestors of his mother." And while the exact question was not before the court, the learned judge added: "And this construction is somewhat fortified by the fact that a bastard can only transmit an inheritance in the ascending line 'to his mother;'" and to preserve harmony in the construction of the statute the court was constrained to adopt this confessedly strict construction. What-

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ever might have been the original intention of the law-makers towards broadening the inheriting capacity of the innocent off-spring of their mother's incontinence, it must be confessed that a rather illiberal view of the statutes respecting them has obtained, which, however, must now be adhered to.

Let the judgment below giving the estate to the wife's beneficiaries be confirmed.

## CASE 88—PETITION ORDINARY—MARCH 28.

Louisville and Nashville Railroad Company v.  
Foley.

## APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **NEGLIGENCE—PLEADING.**—In this action against a railroad company to recover damages for injuries received by plaintiff while coupling cars in the discharge of his duty as brakeman, although it was alleged in the petition that the conductor was negligent in signaling the engineer to back the locomotive while plaintiff was between the cars, and that the injury would not have been received but for such negligence of the conductor, yet as it is elsewhere in the petition alleged that the injury resulted from the negligent backing of the locomotive, and from defects in the coupling apparatus, the plaintiff was entitled to recover if the injury resulted from negligence in either of these respects, whether the conductor was or was not guilty of negligence in signaling the engineer to back the locomotive.
2. **MASTER AND SERVANT—DEFECTIVE APPLIANCES.**—An employer cannot escape liability for an injury to a subordinate employe by reason of the defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof. The limit of inquiry in such case is whether as matter of fact the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective. And while this rule does not apply where examination and inspection is in the line of the injured employe's duty, yet a brakeman can not be reasonably expected or required to know

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whether all the machinery and appliances of a railroad train are in proper condition.

3. **EVIDENCE—RES GESTÆ.**—The declaration of the car inspector that he had been troubled with coupling of the two cars in question before the train started from the yard was competent as a part of the *res gestæ*, although made ten minutes after the injury, and after plaintiff had been carried to the depot near where the injury occurred. But even if proof of that declaration had been incompetent it would not have been prejudicial because the defective condition of the coupling apparatus was otherwise fully proved.
4. **A WRITTEN AGREEMENT BY PLAINTIFF TO USE A COUPLING STICK IN COUPLING CARS** was not binding, unless the coupling stick was in fact indispensable, or at least clearly necessary for security of brakemen against danger incident to coupling cars. And in determining whether a brakeman was guilty of contributory negligence in failing to use a coupling stick, it is in every case proper for the jury to consider the merit of the coupling stick; and as tending strongly to show that it does not answer the purpose for which it was designed, it is competent to show that it has been generally discarded by brakemen.
5. **EXCESSIVE VERDICT.**—A verdict for five thousand dollars for the loss of two fingers is so excessive as to indicate passion or prejudice.

**HELM & BRUCE FOR APPELLANT.**

1. Where the plaintiff specifies in his petition the negligence complained of, he must be confined on the trial to these specifications. (*McCain v. L. & N. R. Co.*, 13 Ky. Law Rep., 809; *Bogenschutz v. Smith*, 84 Ky., 330.)

As the conductor alone is charged with negligence here, the negligence of no other servant can be considered; but the plaintiff failed to show negligence upon the part of any servant.
2. The plaintiff knew the existing conditions, and if these made the attempt to couple the cars a dangerous one, he was guilty of contributory negligence in making the attempt. (*Sullivan v. Bridge Co.*, 9 Bush, 88; *Ky. Cent. R. Co. v. Thomas*, 79 Ky., 165.)
3. The failure of plaintiff to use the coupling stick as required by the rules of the company, and as he had expressly undertaken to do, was such contributory negligence as deprives him of the right to recover, it appearing that if he had used the stick he could not have been injured. (*Cunningham v. C., M. & St. P. R. Co.*, 17 Fed. Rep. 882; *Darracuts v. C. & O. R. Co.*, 83 Va., 288; *Wolsey v. Lake Shore & Michigan Southern R. Co.*, 33 Ohio St., 227.)
4. It was error to admit testimony tending to show that the brakemen generally disregarded the rules of the company and their contracts about the use of coupling sticks.

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- b. The servant can not recover on account of defective materials if he had equal means with the master of knowing of the defect. (*Bogenschutz v. Smith*, 84 Ky., 830.)
6. The court erred in instructing the jury that, although they might believe plaintiff would not have been injured but for his contributory negligence, they should not find for defendant if the defendant or its employes *might have known* of plaintiff's peril by the use of ordinary care, and after discovering his danger, have prevented the injury by the exercise of ordinary care. There was no evidence upon which to base such an instruction; and, besides, it is not the law, as a railroad company does not owe to its employes the duty of *discovering* the peril into which they may be thrown by their negligence. (*L. & N. R. Co. v. Coniff*, 90 Ky., 560; *Ky. Cent. R. Co. v. Thomas*, 79 Ky., 160; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81.)
7. The verdict is grossly excessive. (*Louisville Southern R. Co. v. Minogue*, 90 Ky., 869; *L. & N. R. Co. v. Fox*, 11 Bush, 516; *Standard Oil Co. v. Tierney*, 52 Ky., 367; *Louisville Bagging Co. v. Dolan*, 18 Ky. Law Rep., 493; *L. & N. R. Co. v. Smith*, 2 Duv., 556; *L. & N. R. Co. v. Robinson*, 4 Bush, 508; *L. & N. R. Co. v. Collins*, 2 Duv., 114.)
8. Testimony as to what the car inspector said as to what happened before the train left the yards was not competent as a part of the *res gestae*, the statement being made ten minutes after the injury was received and after the parties had left the scene of the injury.

## HUMPHREY &amp; DAVIE FOR APPELLEE.

1. There was no error in the court failing to instruct the jury that if Foley had "reasonable cause to know" of the dangerous difference in height of the draw-heads, he could not recover; for no such instruction was asked; and, in a civil case, if the instruction is right, "so far as it goes," it is not error that it does not go far enough. *E. & P. R. R. v. Messer*, 11 Ky. Law Rep., 486; *Hedlin v. Auxier*, 9 Ky. Law Rep., 535.
2. "Reasonable cause to know" is treated as knowledge on the part of the company of defects like this, because it is the duty of the company to inspect the trains and know. But there is no such duty on the brakeman to inspect the heights of the draw-heads, and is only guilty of contributory negligence if he actually "knows" of the dangerous difference in the height of the draw-heads. (*Muldowney v. Ill. Cent. R. R.*, 86 Ia., 468; *LeClair v. First Div. R. R.*, 20 Minn., 15; *Thompson on Negligence*, vol. 2, pages 989, 990; *L. & N. R. v. Alexander*, 83 Ky., 590; *Bogenschutz v. Smith*, 84 Ky., 339; *King v. Ohio R. R.*, 14 Fed. Rep., 277.)
3. The admission of the evidence as to the exclamation of the car inspector, Barrett, at the time of the injury, that they "had trouble

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with the coupling down in the yard" is not reversible error, because it was made on the spot, and as a part of the *res gestæ*; and because it was fully contradicted by Barrett himself; and because it was immaterial and could not have influenced the verdict, and there was sufficient evidence without it. (McLeod, Receiver, v. Ginther, 80 Ky., 899; Code, section 184.)

4. It was proper to admit the proof that the rule of the company that all couplings were to be made with "coupling-sticks" was, and had always been a mere "dead letter," and that the use of such coupling-sticks was dangerous; and that the conductor knew that Foley was not using one at the time. (Fay v. Minneapolis R. R., 80 Minn., 281; Hisson v. Richmond R. R., 91 Ala., 514; Probst v. Georgia R. R., 83 Ala., 518; Northern Pac. R. R. v. Nichols, 50 Fed. Rep., 718; Richmond R. R. v. Rudd, 88 Virginia, 648; Louisville R. R. v. Watson, 90 Ala., 68.)
5. The swift backing of the train by the conductor and engineer with such "unusual" speed and force, while Foley was between making the coupling, and while the draw-heads and link were in the condition they were, was such evidence of negligence as to justify the verdict in this case. (L. & N. R. R. v. Sheets, 11 Ky. Law Rep., 781; L. & N. R. R. v. Watson, 90 Ala., 68; L. & N. R. R. v. Moore, 88 Ky., 682; L. & N. R. R. v. Brooks, 88 Ky., 182, 184; L. & N. R. R. v. Mitchell 87 Ky., 336.)
6. It was negligence on the part of the conductor to send Foley, without warning, between the cars to make the coupling, with a "short" "straight" link, instead of a long and crooked link, when the conductor knew that the two cars, which were to come together, had draw-heads that differed from three to five inches in height, and would not fit together. (Denver R. R. v. Simpson, 16 Colo., 55, (25 Am. State Rep., 242); Goodrich v. New York Central R. R., 116 N. Y., 398, (15 Am. State Rep., 410; Toledo R. R. v. Fredericks, 71 Ill., 294; Lawless v. Connecticut R. R., 136 Mass., 1; King v. Ohio R. R., 14 Fed. Rep., 277; Ellis v. New York R. R., 95 N. Y., 552; LeClair v. First Div. R. R., 20 Minn., 15; Muldowney v. Illinois R. R., 36 Ia., 470; Towns v. Vicksburg R. R., 37 La. Ann., 680; Hulett v. St. Louis R. R., 67 Mo., 289; 29 Hun., 641; 78 N. C., 800; 61 Texas, 695; 27 Albany Law Journal, 294; Beach on Contributory Negligence, sections 185, 189.)
7. The verdict of five thousand dollars does not evidence such passion or prejudice in the jury as to justify the court to set aside their verdict and the lower court's judgment. Such an amount is not an unusual verdict for such suffering and mutilation. (Toledo R. R. v. Fredericks, 71 Ill., 295; Schultz v. Chicago R. R., 48 Wis., 375; L. & N. R. R. v. Sheets, 11 Ky. Law Rep., 127; L. & N. R. R. v. Robinson, 18 Ky. Law Rep., 158; Central R. R. v. Debreë, 71 Ga., 406; Wooster



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v. Western New York R. R., 61 Hun. (N. Y.), 628; Sprague v. Atlee, 81 Ia., 1; Murray v. Hudson River R. R., 47 Barbour, 196.) The above are cases of mutilations of a hand.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of M. J. Foley against the Louisville and Nashville Railroad Company for five thousand dollars in damages on account of a personal injury.

It is stated substantially in the petition that August 18, 1889, plaintiff was in employment of defendant as brakeman on a freight train which, having, about eleven P. M., started on a run from the freight yard in Louisville, became, when it reached East Louisville, disconnected by reason of the coupling machinery of two cars breaking or becoming loosened; that he was thereupon directed by the conductor to recouple the two cars, and while he was between them for that purpose the conductor signaled the engineer to back the locomotive, to which was attached five of the twenty-five cars composing the train, but did not warn plaintiff he had done or was about to do so, and in consequence of such failure his hand was caught between draw-bars of the two cars, when they came together, and injured; that said draw-bars could not be safely or properly used together because not on a level, one being about four inches higher than the other, and that only a short link with which to couple the cars was provided; consequently performance of plaintiff's duty was rendered on that occasion extra hazardous; that the locomotive and cars attached to it were backed on a down grade without brakes being fastened so as to moderate their speed,

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and as a consequence the engineer lost control, and they moved to the stationary part of the train more rapidly than would have been otherwise the case. It is further stated that condition of the draw-bars and character of link as described were known to the conductor, but not to plaintiff until the accident occurred.

The evidence does not satisfactorily show the conductor was negligent as to the matter of signaling the engineer to back the train. And for that reason, and because it is, in general terms, alleged in the petition the injury would not have been done but for such negligence of the conductor, counsel argue the verdict is not supported by competent and relevant evidence. But it is, elsewhere in the petition, alleged that the injury resulted from backing the locomotive and cars in the negligent manner mentioned, and from inequality and unevenness of said draw-bars and shortness of the link, as well as from negligence of the conductor in signaling the engineer to back without warning to plaintiff. And as the other facts stated show, *prima facie*, an actionable injury independent of negligence of the conductor in the particular charged, it was competent for plaintiff to prove all circumstances legitimately connected with the occurrence, and for the jury, under proper instructions, to inquire and find whether defendant was liable by reason of negligence of the conductor, engineer or other employe in respect to defects of the coupling machinery, or manner in which the locomotive and cars were backed. For if the injury to plaintiff resulted from either of the alleged causes, or from the two

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combined, right of recovery existed, whether the conductor was or not guilty of negligence in the particular matter mentioned.

The lower court, therefore, properly instructed the jury that if the injury was caused by improper or defective appliances furnished plaintiff by defendant with which to perform the duties required of him, and defendant knew or might have known of their condition and character by use of ordinary care, and plaintiff did not know thereof, the law was for him, and the jury should so find. Equally pertinent and proper was an instruction to so find if the injury was caused by gross negligence of the engineer or other co employe.

But counsel contend that the first instruction is erroneous, because exercise by plaintiff of care and diligence to discover the character and condition of the coupling machinery before using them, was not made a condition of his right to recover. The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for use of employes, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employe by reason of defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, that rule would not amount to much as either an incentive to the employer to do his duty, or protection to the employe against personal injury.

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The limit of inquiry in such case as this is, whether, as matter of fact, the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective.

The rule, of course, does not apply where examination and inspection is in the line of an employe's duty. But a brakeman is never intrusted with the duty of inspecting, and therefore can not be reasonably expected or required to know whether all the machinery and appliances of a railroad train are in proper condition.

In this case the plaintiff testified he did not know of the condition and character of the draw-bars and link in question before he was injured. And in view of the fact the train had been recently made up in the defendant's yard by other employes, and he was unexpectedly called on near midnight to perform the service of coupling the two cars that had broken apart, it is manifest he had no previous opportunity, even if it had been his duty, to inspect the twenty-five cars composing the train, in order to ascertain the condition of each of them. And it, therefore, seems to us not only that plaintiff's statement is entitled to credence, but that here is presented a fit illustration of the injustice and unfairness of requiring a subordinate employe like a brakeman, as a condition of his right to recover against his employer for personal injury, to show that he had previously exercised diligence to discover the character and condition of all the machinery and implements provided for him to use, and by which the injury was done.

There may be cases where, in fact, the defect is so

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patent that the jury will conclude such subordinate must have discovered and known it before taking the risk of injury, but such is not this case.

Whether the condition and character of the draw-bars and link plaintiff was required to use was the sole cause of his injury, or it resulted from the manner in which the locomotive and cars were backed, or be attributed to the two causes combined, or was altogether result of his own negligence, were questions for the jury, whose finding, in that respect, we do not feel authorize to disturb.

An objection was made to evidence tending to show that the car inspector said about ten minutes subsequent to the injury, and after plaintiff had been carried to the depot near, that he had been troubled with coupling of the two cars in question before the train started from the yard. But it seems to us that declaration of the car inspector having been evidently made as the mere result or consequence of feelings or motives coexistent with the injury, and without time or incentive for calculation as to effect or influence it would have upon rights of the parties, should be regarded as of the *res gestæ*, and therefore competent evidence. But if proof of that declaration had been incompetent, it would not have prejudiced substantial rights of defendant, because condition and character of coupling machinery of the two cars, as described in the petition, was otherwise fully proved.

It appears that plaintiff, at the time of his employment as brakeman, acknowledged in writing, receipt from defendant of a coupling-stick, which he promised to use when coupling cars while in defendant's

service, and it is now contended that his failure to use the stick for that purpose when injured should be treated such contributory negligence as to defeat recovery in this action. The written agreement obviously was not binding on plaintiff unless the coupling-stick was in fact indispensable, or at least clearly necessary for security of brakemen against danger incident to coupling cars; for defendant had no right otherwise to bind plaintiff to use the stick, or to make habitual use of it a condition of his right to maintain an action for personal injury received while engaged in coupling cars. The decisive question, then, is, whether, but for plaintiff's failure to use the coupling-stick on occasion of receiving the injury complained of, it would not have occurred. It is proved that although a coupling-stick was, at the time plaintiff signed the writing, delivered to him, the conductor who delivered it told him the written undertaking was required as mere form. It is further shown that in order to use the stick it is necessary for a brakeman to carry it about his person in a belt, which causes more danger of falling and being injured while running on top of a car, or climbing hurriedly on or off it, than is compensated for by any advantage or security against injury it may be. Besides, the coupling-stick is proved to be generally discarded, and not used at all by brakemen on freight cars of the defendant, which fact is not only proper to be proved, as was done on trial of this case, but tends strongly to show the coupling-stick does not answer the purpose for which it was apparently designed. For the opinion of brakemen in

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regard to utility of an implement such as a coupling-stick, which they only have use for, and must necessarily know more about than any other class of persons, is of course entitled to great weight, because their knowledge is derived from actual experience, and after an anxious effort to properly test its value; and no evidence could speak more decisively against the value of a coupling-stick than the general disuse of it by brakemen. But it is competent for the jury in every case like this to consider the merit of the coupling-stick in determining the question of contributory negligence, as was doubtless done on trial of this case, and we need not, therefore, consider the question further.

But it seems to us the amount of damages found in this case is so excessive and disproportioned to the actual injury sustained, as to make it our duty, under section 340, Civil Code, to set aside the verdict. For if five thousand dollars damages for loss of two fingers is not so excessive as to appear to have been given under influence of passion or prejudice, it is hard to tell when a case would occur justifying interposition of the court for protection of a defendant against spoliation. This court has always been averse to disturbing the finding of a jury, and will not do so except when their verdict is palpably, or, in language sometimes used, flagrantly, against the evidence, and we are not authorized to set it aside on account of excessive damages, unless the condition provided for in the section referred to exists, which is clearly this case.

Wherefore the judgment is reversed for a new trial consistent with this opinion.

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Sydner, &c., v. Mt. Sterling National Bank.

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CASE 84—PETITION ORDINARY—MARCH 30.

**Sydner, &c. v. Mt. Sterling National Bank.**

APPEAL FROM MONTGOMERY COURT OF COMMON PLEAS.

**NATIONAL BANKS—FORFEITURE OF INTEREST BY CHARGING USURY.—**

Under the national banking law a national bank, by taking or charging a usurious rate of interest, forfeits the entire interest which the note or other evidence of debt carries with it. Nor is the forfeiture waived by the giving of subsequent notes. However many renewals there may have been, the interest on the several renewed notes will be traced into the last note and the entire interest eliminated, all partial payments being applied to the principal.

**STONE & SUDDUTH AND Z. T. YOUNG FOR APPELLANT.****LEWIS APPERSON FOR APPELLEE.**

Briefs not in record.

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

The appellee is doing a banking business in this State under the United States banking law. As such banking institution, it loaned the appellants money, and took their note therefor, charging them a usurious rate of interest and adding the same in the note, and at the maturity of the note, it was renewed and usurious interest again charged and included in the new note. Renewals were in like manner made and usurious interest added therein, until it resulted in the present note, when it was sued on. The appellants pleaded the foregoing facts in regard to the usury embraced in the several renewal notes, and asked that the interest be forfeited in consequence of the usury embraced in the several renewals, and that only the principal be recovered.

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The National banking law provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." There is no doubt that each renewed note contained usury therein, and that it was "knowingly done." The question to be decided is, whether the entire interest that the several renewed notes bore, can be eliminated from said notes in an action on the last note, so that nothing shall be recovered thereon except the principal.

Upon that subject the following cases seem conclusive: In the case of *Farmers and Mechanics' Bank of Mercer v. Hoagland* (United States Circuit Court) 7 Fed. Rep., 161, the court say: "By the terms of the act of Congress the charging of such rates of interest worked a forfeiture of the entire interest which the several notes carry with them. Now such forfeiture was not waived by the giving of the subsequent notes, although as respects them the agreed rate of interest was a legal rate. They were mere renewals, and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. In so far, then, as the notes in suit embrace the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction it affects all consecutive securities, however remote, growing out of it; and neither the renewal of an old nor the substitution of a new se-

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curity between the same parties can efface the usury. The bank incorporated in the new notes usurious interest previously charged, as a part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Upon fresh renewal interest was charged upon usurious interest which had entered into the prior notes as principal."

The case of the Moniteau National Bank v. Miller, 73 Mo., 187, decides the same question the same way.

The case of Alves' Assignee v. The National Bank of Henderson, 89 Ky., 126, directly decides the same principle. The leading idea in these decisions is, that the new notes are mere renewals—new evidences of an old debt—and given without any new consideration. Nor do the new notes operate as a payment of the debts for which they were given; and as the usury embraced in the old notes taints the entire interest, and renders it vicious and void, the agreement to pay it is without any lawful consideration. Consequently the unlawful consideration may be eliminated from each renewal note; for such note is but the new evidence of the old debt, which includes the vice and unlawful consideration, which, as between the same parties, may be traced to the new note and eliminated.

We now construe Brown, Assignee, &c., v. Marion National Bank, 92 Ky., 607, to be in harmony with the foregoing views.

The judgment does not eliminate the entire interest from the several notes, but only the usury. This is error. The entire interest on all the notes should be eliminated, and judgment rendered for the prin-

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principal alone, and the partial payments should be applied to the principal.

The judgment is reversed, and cause remanded, &c.

CASE 35—APPEAL TO CIRCUIT COURT—APRIL 4.

West Virginia, &c., Railroad Company v. Gibson, &c.

APPEAL FROM BELL COURT OF COMMON PLEAS.

1. IN CONDEMNING LAND FOR RAILROAD PURPOSES the diminution in value of the whole tract by reason of the appropriation of the land actually taken is to be estimated as a part of the compensation to which the owner is entitled. And from this amount nothing can be deducted by reason of the benefits and advantages that may reasonably be anticipated from the construction and operation of the road.
2. IN ESTIMATING THE VALUE OF PROPERTY TAKEN FOR PUBLIC USE, the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by the use to which the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The issue is not what the land is worth to the corporation seeking to appropriate it, nor the expense that it would be compelled to incur in obtaining other property, or in fitting it for its business if it should fail to get the property sought to be condemned.

J. R. SAMPSON FOR APPELLANT.

The measure of recovery is the market value of the land at the time it was taken without reference to uses to which it might be put in future, and without reference to its peculiar value for railroad purposes. (Henderson, &c., R. Co. v. Dickerson, 17 B. M., 178; Elizabethtown, &c., R. Co. v. Helm, 8 Bush, 684; Robb v. Mt. Sterling Turnpike Co., 3 Met., 117, Lewis on Eminent Domain, sec. 478 and notes.)

WM. LINDSAY, M. J. MOSS, UNTHANK & RILEY, D. G. COLSON AND FITZPATRICK OF COUNSEL ON SAME SIDE

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## WM. LOW AND C. W. METCALFE FOR APPELLEES.

1. It was proper to consider the value of the land not only with reference to the uses to which it had been applied, but with reference to the uses to which it was peculiarly suitable, having regard to the existing business and wants of the community, or to such as might be reasonably expected in the immediate future. (Wood on Railway Law, vol. 2, p. 926; 7 Lawson's Rights and Remedies, p. 6136; Beach on Law of Railways, vol. 2, sec. 815; 6 Am. and Eng. Enc. of Law, p. 569.)
2. It was competent for appellee to prove that the land was peculiarly valuable for railroad purposes. (Mississippi, &c., Boom Co. v. Patterson, 98 U. S., 403; L. R. Junction R. Co. v. Woodruff, 49 Ark., 391; Chicago, &c. v. Jacob, 110 Ill., 414; Gardner v. Brookline, 127 Mass., 358; Trustees of Coll. Point v. Demmet, 5 N. Y., Sup. Court, 217; Young v. Harrison, 17 Ga., 30; Russell v. St. Paul, &c., R. Co., 33 Minn., 210; Dowd v. Mason City, &c., R. Co., 76 Iowa, 488; Montana Ry v. Warren, 12 Pac. Rep., 642.)

## CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant sought by this action to condemn a strip of land along the bank of the Cumberland river, and near the town of Pineville, Ky., and immediately at the foot of the mountain, for its railroad track. The trial, on appeal to the circuit court, resulted in a verdict and judgment estimating the value of about five and one-half acres of land condemned, at over twelve thousand dollars. The appellant has appealed.

The rule, according to the cases of *Asher v. L. & N. R. Co.*, 87 Ky., 391, and *L. & N. R. Co. v. Ingram*, MS. opinion, October 14, 1890 (12 Ky. Law Rep., 456), is: That just compensation must be first made to the owner of property when it is taken for public use, which must be done, in case of condemnation for railroad purposes, by ascertaining the value of the entire tract, excluding all consideration of the question of enhancement of the value of the land resulting from the proposed improvement; then what will be the

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value after deducting such part of it as may be taken? The difference in value thus found, still including the enhancement, is the true compensation to which the owner is entitled. How much less is the land worth after the taking than before the taking, excluding, always, the question of enhancement of value by reason of the improvement? The value is not reached by determining the value of the land taken for actual use, but its value when considered in its relation to the entire tract, which includes every direct damage or injury tending to diminish in value the entire tract by reason of the use and appropriation of the strip for the contemplated purpose. The diminution in value of the entire tract is a condemnation for public use, which should be paid for the same as the strip that is condemned for the road-bed. It is this condemnation that the owner is entitled to pay for, &c.

The court allowed the appellee to prove what was the market value of this strip of land, taking into consideration its close proximity to the town of Pineville, and its adaptability for town lots and building residences thereon, and for railroad tracks and other railroad purposes. The question is, was such evidence competent?

The rule seems to be that in estimating the value of property taken for public use the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by what use the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the

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community, or such as may be reasonably expected in the immediate future. The proper inquiry in such case is, what is its value in view of any use to which it may be applied, and to all the uses to which it is adapted. (See *Mississippi, &c., Boom Company v. Patterson*, 98 U. S., 403; *Lewis on Eminent Domain*, section 479.) The issue in such case is not what the land is worth to the appellant, or how profitably it may use it in its business; nor the costs and expense that it would be compelled to incur in obtaining other property, or in fitting it for its business, if it failed to obtain that particular property. (See *Lewis on Eminent Domain*, sec. 479, and authorities there cited.) The law should be given to the jury without including the evidential matters indicated; they are evidence only. But in such cases the jury should be admonished not to let those matters indicated as not evidence, influence them.

The judgment is reversed, &c.

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CASE 86—PETITION EQUITY AND INDICTMENT—APRIL 4.

Tabor v. Lander, &c.

Haynes v. Commonwealth.

APPEALS FROM HANCOCK CIRCUIT COURT.

1. **LOCAL OPTION—REPEAL OF STATUTE.**—Where the general local option law had been voted into operation in a civil district of which a city formed a part an amendment to the city charter conferring for the first time authority on the city council to license taverns and coffee-houses, with the privilege of retailing liquors in the city, repealed the local option law so far as the city was concerned.

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2. **SAME.**—The power to license and tax in such a case must mean an exclusive power, and, therefore, the general local option law can not again be voted into operation in the city. But, even conceding that it can be, the vote must be taken in the town alone, and not in the civil district, the amendment to the charter having at least separated the city from the civil district as a political division.

**SWEENEY, ELLIS & SWEENEY FOR APPELLANT.**

Whether or not the amended charter repealed the local option law as to the city, it is clear that the city, after its passage, had the right to regulate the liquor question for itself, and the city having taken a separate vote, as it had a right to do, and voted in favor of the sale of liquor, the local option law no longer existed in the city. (*Commonwealth v. Bogie*, 1 S. W. Rep., 582; *Commonwealth v. Cain*, 14 Bush, 538; *Commonwealth v. King*, 86 Ky., 436.)

**W. J. HENDRICK, ATTORNEY-GENERAL, FOR COMMONWEALTH.**

1. The amendment of April 30, 1888, was not intended as a repeal of the local option law for district No. 1, in Hancock county. The legislative will had united them as a political division on the question of the sale of liquor, and the amendment referred to could not, and did not, divorce them. (*Commonwealth v. Cain*, 14 Bush, 533; *Commonwealth v. Bogie*, 1 S. W. Rep., 582; *Commonwealth v. King*, 86 Ky., 436.)
2. Even if the amendment attempted to repeal the local option law it was void, because the subject of the act is not expressed in the title.

**W. S. MORRISON FOR APPELLEES LANDER, &c.**

1. The city of Hawesville had no authority to vote on the liquor question in April, 1892, as two years had not elapsed since the election was held in magisterial district No. 1, in August, 1890.
2. Even if two years had elapsed there would still have been no authority to take a separate vote in the city. Where the local option law has by vote become operative over the whole of a magisterial district, it is not within the power of a city lying within the district to take a separate vote on the question and thereby declare the law not to be in force in any part of the district. (*Young v. Commonwealth*, 14 Bush, 161; *Commonwealth v. King*, 86 Ky., 436.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

On the petition of the appellees, Lander and others, filed in the circuit court in May, 1892, a writ of prohibition issued against the appellant, Tabor, as judge of

the Hancock County Court, who is alleged to be about to grant licenses to sell spirituous, vinous and malt liquors within the limits of Hawesville, a city embraced within the territorial limits of magisterial district No. 1, in Hancock county. In this district, it is alleged, at a duly appointed election, held in August, 1890, a majority of the legal voters had voted against the sale of such liquors, and of which fact due record had been made in the proper office. Such is the first-named proceeding.

In the second case mentioned above, the appellant, Haynes, having obtained a license from the county court (Tabor, judge) to sell such liquors in the town named, and being engaged in so selling, was indicted in May, 1892, for violating the "local option" law so called, and on an agreed state of fact, the lower court having perpetuated the writ of prohibition against county judge Tabor, and found Haynes, the liquor dealer, guilty of violating the law named, they have each appealed from the judgments against them, and as the main question in each case is the same, they will be heard together.

That question is, whether or not in May, 1892, the local option law was in force in the town of Hawesville.

In the district a vote was taken under the provisions of the law, in August, 1884, and again in 1890, resulting each time against the sale. In April, 1888, an amendment to the charter of the city of Hawesville was adopted by the Legislature, conferring for the first time authority on the city council to license taverns and coffee-houses with the privilege of retail-



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ing liquors in the city, and it is now insisted that this act repealed the operation of the local option law then in force, so far as the city was concerned. In the case of Gifford v. Commonwealth, 2 Ky. L. Rep., 437, it was held by this court that a section in the charter of the town of Falmouth, passed by the Legislature in 1878, granting the council of that town the power to license and regulate the sale of liquors, operated as a repeal of the general local option law, which was then in force in the town, because repugnant thereto and inconsistent therewith, and the same construction has been adopted by the courts of other States (Whisenhunt v. State, 18 Texas App., 491). And it would seem, outside of this direct authority, that such must be the necessary result of such legislation.

The Legislature has complete control of the subject. It may say that liquors shall not be sold in a given territory, or that the question of its sale shall be left to all the voters therein, or that liquors may be sold in a given locality, or that the question may be left to the council of a city or board of trustees. In this case, the legislative body must have known that the local option law had been voted into operation in Hawesville, and was in force in April, 1888, and its action in making it *thereafter lawful* for the council of said city to fix the rate of city tax for the privilege of selling liquors by retail in the city, must have been intended to vest the power of licensing the sale in a different set of electors—that is, in the councilmen of the city, instead of the voters in the district.

The city was incorporated in 1882, and while the

powers of the city council are set out in great detail, and the trades and occupations placed under the control and regulation of that body are extraordinarily numerous, the right to license, regulate or control the liquor trade is nowhere conferred ; and while the local option law was in full force, and in operation in the district, the Legislature enacts a law directly repugnant to, and inconsistent with, the general law, and specially empowers the city authorities to exercise its taxing power on this special traffic for the benefit, it is alleged, of the common schools of the city.

We think a clear intent to repeal or suspend the operation of the general law is evident.

It was, in effect, a separation of the two political divisions—the city from the civil district.

But, thereafter, and in 1890, the vote was taken in the district and resulted against the sale, and it is insisted that this should operate to re-enact the general law, or, at least, again put into force and effect that law, even if it had been suspended by this amendment. We can not see how this could be. If the right to regulate the traffic was conferred on the council, a vote of the people, and that too of a people in an outlying territory, can not affect the legislative power so conferred. The power to license and tax in such a case must mean an exclusive power. Any other construction would result in irreconcilable conflict of authority.

Prior to the passage of the local option law the councils of the various towns and cities of the State, as a rule, had the right to license and tax this business. The local option law was enacted, applicable

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~~James~~ Tabor v. Lander, &c. Haynes v. Commonwealth.

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to all alike, and it was the manifest intention of the Legislature to have this law apply to such towns and cities, in spite of the right theretofore conferred to so control this trade by the councils, &c. But when that law has been put into operation in a civil district, and the Legislature, as in this case, deliberately confers that right or power on another and specified tribunal, it must be supposed to have intended a change in the manner of controlling and regulating the traffic; and until this special act be repealed, the special power and right therein conferred must be regarded as the exclusively controlling power.

It may be observed in this case that before exercising the power conferred under the amendment, the vote was again submitted to the people of the city of Hawesville, as provided by the general law, and this resulted in favor of the sale. This, whether necessary or not, was in pursuance of the spirit of the local option law. The least possible effect to be given the amendment of April, 1888, is that of separating or divorcing the theretofore existing political divisions, and of recognizing the city]as having a distinct and separate entity, and as a separate and distinct political division; and in this view the most that can be required of the city is to take the vote on the question of the sale as such distinct division, and this was done by the vote of 1892. We think it clear, therefore, that the right to issue the license existed, and that when issued it afforded protection to the licensee. It is not necessary to consider other minor questions raised by counsel for the appellants. The petition should have been dismissed and the writ of

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Roberts v. Yancey, &c.

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prohibition quashed, and the finding in the penal case should have been for the defendant.

For these reasons the judgments in both cases are reversed, with directions to dismiss both proceedings.

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CASE 37—PETITION EQUITY—APRIL 6.

## Roberts v. Yancey, &amp;c.

APPEAL FROM OWEN CIRCUIT COURT.

1. CHAMPERTY.—A contract whereby a note was assigned to an attorney in consideration of his agreement to bring suit on the note at his own cost and divide with the assignor whatever sum he might collect was champertous and void.
2. SAME.—To constitute a champertous contract under the statute it is not necessary that an action should be pending.
3. A COMMON LAW JUDGMENT AGAINST A CESTUI QUE TRUST rendered in an action to which the trustee was not a party does not bind the trustee, and he may resist its enforcement against the trust estate upon the ground that the contract upon which it was rendered was void. A proceeding against either the trustee or *cestui que trust* has no effect upon the other, both being essential to the determination of any action in reference to the trust estate.

## LINDSAY &amp; BOTTS FOR APPELLANT.

1. The defense set forth in the amended answer of the appellee R. H. Yancey as trustee of R. S. Yancey, can not be pleaded in this action by R. S. Yancey, or his trustee or other privies, such defense being pleadable only in the action in which the judgment now sought to be enforced was rendered. And so long as that judgment remains in force this plea of appellee is barred. (*Rochester v. Anderson*, 3 Bibb, 339; *Allen v. Hall*, 1 Mar., 526; *Hayden v. Booth*, 2 Mar., 354; *Carlyle v. Long*, 3 Mar., 435; *Moore v. Lockett*, 2 Mar., 527; *Cates v. Loftus*, 4 Mon., 444; *Hardin v. Smith*, 7 B. M., 400; *City of Newport v. Taylor*, 11 B. M., 362; *Crabb v. Larkin*, 9 Bush, 166; *Talbott v. Todd*, 5 Dana, 198; *Webb v. Galloway*, 1 Litt., 79; *Lewis v. Stafford*, 4 Bibb, 320; *Shadburn v. Jennings*, 1 Mar., 179; *Clary v. Marshall*, 5 B. M., 273; *Alexander v. Slavens*, 7 B. M., 356; *Cates v. Woodson*,

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- 2 Dana, 455; McChord v. McClintock, 5 Litt., 304; Feltman v. Butt, 8 Bush, 120; Walker v. Thomas, 88 Ky., 486.)
2. The amended answer of R. H. Yancey, trustee, failing to allege that appellant was "not a party on record" is fatally defective. (Gen. Stats, chap. 11, sec. 1.)

## EVAN E. SETTLE FOR APPELLEES.

1. The trustee is not bound by the judgment against the *cestui que trust*.
2. To constitute a champertous contract, it is not necessary that a suit should be pending (Gen. Stats., chap. 11, sec. 1; Rust v. Larue, 4 Litt., 427; Davis v. Shannon, 15 B. M., 64; Miles v. Collins, 1 Met., 811; Brown v. Beauchamp, 5 Mon., 416; Chiles v. Conley, 9 Dana, 387; Swanger v. Crutchfield, 9 Bush, 416; Crowley v. Vaughan, 11 Bush, 518.)

## CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

R. S. Yancey executed and delivered to Jesse Holbrook his promissory note. Thereafter, Holbrook assigned said note to W. B. Roberts, a lawyer, and appellant. The consideration of the assignment was that the appellant, as such assignee, was to bring suit on said note against R. S. Yancey at his own costs and expense, and divide whatever sum that he might collect from said Yancey, between himself and Holbrook. Judgment was obtained by default against Yancey for the amount of said note, and execution having issued thereon and returned no property found, the appellant instituted this equitable action against the said appellant, and R. H. Yancey, his trustee, to subject the trust estate held by R. H. Yancey, to said debt. R. H. Yancey, who was not a party to the common law suit, by an amended answer contested the right of the appellant to subject said trust estate to said debt, upon the ground that the contract being champertous and void, the judgment rendered thereon is void. The lower court overruled a demurrer to the

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amended petition, and from this action the appellant appealed to the Superior Court; and that court affirmed the judgment; and from that opinion this appeal is prosecuted.

The appellee contends, first, that the law of champerty does not apply to this case, because it is not alleged that suit was pending at the time the contract was made with a person not a party on record.

Section 1 of chapter 11, General Statutes, provides: "All contracts, agreements and conveyances made in consideration of the services to be rendered' in the prosecution or defense, or the aiding in the prosecution or defense in or out of court, of any suit by any person not a party on record in such suit, whereby the thing sued for or in controversy, or any part thereof, is to be taken, paid or received by such person for his services or assistance, shall be null and void."

SECTION 8. "Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

As to the first contention of the appellant, it is sufficient to say that it is not necessary that an action should be pending in order to create a champertous contract within the meaning of said section. (See *Rust v. Larue, &c.*, 4 Litt., 418; 3 American, and English Encyclopedia of Law, page 70.) Also the section quoted does not mean that an action must be pending in order to make the contract champertous.

The eighth section quoted expressly provides that neither party to such contract shall have any right of action or suit thereon. Said section makes it clear,

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if there was otherwise any doubt, that no action or suit shall be brought on such contract, evidently because the contract, being vicious and against public policy, tainted the whole transaction, and consequently any judgment rendered thereon, the object of which is to enforce said contract, may be resisted by the proper parties. Therefore, there is no doubt that any person not a party or privy to said common law judgment is not bound thereby; and whenever an attempt to enforce it antagonizes his rights or duties, he may resist said judgment to the extent that its enforcement antagonizes his rights, and in order to do so he may show that said judgment is void on account of champerty, &c.

The trustee held some estate willed to him by his father in trust for his brother, R. S. Yancey, and he was intrusted with the control and management of the same for the use of his said brother during his life, and then to his children. This trust does not make him his brother's privy. His control and management of the estate is absolute, being only subject to an action for damages if he abuses his trust.

He, as trustee, and his brother as *cestui que trust*, as a general rule, are regarded as being so independent that proceedings against one have no effect upon the other, and both are essential to a complete determination of any action in reference to the trust estate. See Freeman on Judgments, section 173. That is, to say, as a general rule, a common law judgment against the *cestui que trust*, the trustee not being a party, does not bind him, and he, in an action that seeks to

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subject the trust estate to satisfaction of that judgment, may contest the correctness of the judgment and show that it is void, in order to protect the trust property.

The judgment is affirmed.

CASE 38—PETITION EQUITY—APRIL 8.

## Berry v. McCollough.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. ELECTIONS UNDER NEW CONSTITUTION—ELECTION OF CORONER.—Section 148 of the new Constitution, which provides that no county officer "shall be elected in the same year in which members of the House of Representatives of the United States are elected," did not forbid an election in 1892 to fill a vacancy in the office of coroner, although members of the House of Representatives of the United States were then elected. Section 148 of the Constitution, even conceding that it applies to vacancies, can not be given full effect until the elective machinery of the new Constitution shall have been put into full running order, the election of county officers in 1894, expressly provided for by section 99, being in the face of section 148.
2. NOTICE OF ELECTION.—Where the time for holding an election is fixed by the Constitution or by statute, a notice of the election is not essential to its validity.

JOHN ROBERTS FOR APPELLANT.

1. This is not a case to try the right to the office of coroner, but simply a suit to protect the occupant in his possession against an intruder; and the court should try only the question as to whether Berry had ever been the legitimate coroner of Jefferson county, and whether he was holding over, claiming under the legitimate right which he acquired, and whether he was in the actual occupancy of the office, and whether McCullough was disturbing him in that occupancy. (*Wayman v. Commonwealth*, 14 Bush, 466; 2 High on Injunctions, sec. 1815.)
2. He who is elected to fill a vacancy in an office is as much an officer as he who fills a full term, and when section 148 of the Constitution

94	947
97	150
94	247
99	41
99	556
94	247
107	487
94	247
113	793



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provides that no county officer shall be elected in the same year in which members of the House of Representatives of the United States are elected, it means to embrace such officers whether they stand for a full term or a part of a term. Therefore, there could have been no election in November, 1892, for coroner of Jefferson county, and appellee was not elected, and has no right to the office. (New Constitution, secs. 148, 152, 107, 99.)

**THOMAS F. HARGIS ON SAME SIDE.**

1. The statute requires eight days' notice of a special election to fill a vacancy in the office of coroner. (Gen. Stats., chap. 83, art. 6, sec. 2, subsec. 4.)
2. Notice of a special election for the length of time required by the statute is necessary to the validity of the election where the law does not fix the day. (McKune v. Weller, 11 Cal., 49; People v. Martin, 12 Cal., 409; Sawyer v. Hayden, 1 Nev., 75; State v. Collins, 2 Nev., 351; Beal v. Ray, 17 Ind., 554; Cooley's Const., Limit., p. 608; McCrary on Elections, sec. 118; Toney v. Harris, 85 Ky., 461, 479.)
3. Section 152 of the Constitution does not fix the day upon which special elections shall be held; it only provides that the day to be fixed for filling a vacancy shall be on one of the several general elections or annual elections that may follow the conditions mentioned in that section.

**HARGIS & TURNER, JR., JOHN I. CALLOWAY AND KOHN,  
BAIRD & SPECKERT OF COUNSEL ON SAME SIDE.****HUMPHREY & DAVIE FOR APPELLEE.**

1. Berry's remedy, if any, was not by this proceeding in equity, but by a suit under sections 488 and 487 of the Code, for usurpation of office. (High on Injunctions, sections 1812 to 1816; Tappan v. Gray, 9 Paige, 507; Dechante v. Warner, 20 American Reports, 287.)
2. Section 148 of the new Constitution applies only to elections for the full terms, and not to elections to fill vacancies.
3. As this was a case where the unexpired term did not end at the next succeeding annual election, and where three months intervened before the succeeding annual election, it came within section 152 of the new Constitution, and the election was properly held in November, 1892, at the time when the judges and clerks were elected.
4. The time and place for holding this election being fixed by the Constitution itself, there was no need of any further notice of time and place. (Toney v. Harris, 85 Ky., 475; Cooley's Constitutional Limitations, p. 759; Wheat v. Smith, 51 Arkansas, 266.)

**EDWARD J. McDERMOTT OF COUNSEL ON SAME SIDE.**

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JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In August, 1890, one H. C. Miller was elected coroner of Jefferson county for a term of four years. Dying in the early part of March, 1892, on the 18th of that month the appellant Berry was appointed by the Jefferson County Court to fill the vacancy occasioned thereby. At the succeeding November election, 1892, the appellee McCullough, having theretofore defeated appellant and others in a primary election for the Democratic nomination, was elected over his Republican opponent as coroner of the county, and, having obtained the proper certificate to that effect from the examining board, was duly inducted into office and proceeded to discharge his duties. About the close of the primary the appellant Berry, determining that no election for coroner could be held legally in November, announced his intention to hold on under his appointment, and did continue to hold inquests after the election and qualification of McCullough. Alleging that he was in the rightful possession of the office by virtue of his appointment by the county court, and that the defendant McCullough was an intruder therein, whose acts were producing confusion in the office and hindrance to the proper discharge of his duties, he sought by this action in equity to enjoin the defendant from such unlawful interference.

Upon hearing, the motion for the injunction was overruled by the special chancellor; McCullough's answer to the petition was thereafter filed, and a demurrer thereto was overruled. Upon final hearing, on March 10, 1893, the chancellor dismissed the plaint-

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iff's petition, and from that judgment he has appealed.

Waiving the preliminary question of the appellant's right to maintain the action, we think it manifest that section 152 of the new Constitution fully authorized the election in November, 1892, to fill the vacancy caused by Miller's death.

That section provides thus: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term \* \*."

In this case, the death of Miller, and the appointment of his successor, occurred more than three months prior to the next succeeding regular election, namely: November 8, 1892, at which county officers, to wit, circuit court clerk and sheriff, were elected under the express provisions of the Constitution. The term of the deceased coroner did not expire at that time, and hence it was proper that said vacancy should be filled by election for the remainder of the term.

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It is true that a coroner was not then to be elected, but sheriffs and circuit court clerks were, and these are of one and the same class.

But the appellant contends that under section 148 of the Constitution "no officer of any city, town or county, or of any subdivision thereof, except members of municipal legislative boards, shall be elected in the same year in which members of the House of Representatives of the United States are elected."

The learned chancellors below were of opinion that section 148 had reference alone to elections for full terms. And such seems quite probable; but whether it does or not, the Constitution transferred the time of holding the regular August election, 1892, to November of that year, and provided for a regular election of county and district officers at that time, and that was the next succeeding annual election provided for under the Constitution after the vacancy in question occurred. This was in spite of the inhibition of section 148, and so will the elections of county officers in 1894 be in the face of this inhibitory section. After the election machinery of the new Constitution shall have been put into full running order, the elections for county officers may not be held in years "in which members of the House of Representatives of the United States are elected."

The confusion in this case, we think, arises from an attempt to look at the question from a standpoint in advance of the present—to imagine ourselves as holding elections under the Constitution as it will hereafter operate, and not as it now plainly provides. The contention of the appellant would stretch the appointive

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term very far beyond what was ever intended or provided for under either the old or the new Constitution.

It is contended, however, that the election of the appellee was invalid because of want of proper notice. Only three days' notice, instead of eight as required by law, was given, and the case of *Toney v. Harris*, 85 Ky., 475, is cited as authority in support of this view. But that was a case in which the court expressly decided that "neither by the Constitution nor statute is the first Monday in August prescribed as the day in course" for holding the election in question; and further, it was said: "To make the election of an officer of government legal, there must be a time fixed for holding such election either *by law* or by the officer empowered by law to do so." If, therefore, we are right in determining that the time of holding the election to fill the vacancy now in question was fixed by the Constitution, the case cited is authority in support of the validity of the election, and such is the well recognized rule in most of the States. Mr. Cooley thus sums up the true doctrine: "Where, however, both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity, but the right to hold the election comes from the statute, and not from the official notice. It has, therefore, been frequently held that when a vacancy

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exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given." (Cooley's Com. Lim., 6th ed., page 759.)

Nor was there any lack of actual notice in the present instance. The participation of the electors in the election was quite general, and the interest manifested was widespread.

The election to fill the vacancy having been properly held at the regular November election, and the appellee having been duly elected, the appellant's petition was properly dismissed, and the judgment is affirmed.

CASE 39—PETITION ORDINARY—APRIL 8.

Mutual Life Insurance Company of New  
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APPEAL FROM PAYETTE COURT OF COMMON PLEAS.

1. **LIFE INSURANCE—DEATH OF APPLICANT BEFORE DELIVERY OF POLICY.**—Where a policy of life insurance was placed by an agent of the company in the hands of a broker through whom the application had been received, to be by him delivered to the insured, the contract must be regarded as completed, and binding on the parties, although the applicant died before the policy was delivered to him, the agent having received and appropriated to use of the company the premium which was paid by the insured to the broker; and in this action on the policy the court properly instructed the jury that the policy had been delivered.
2. **SAME—MISREPRESENTATIONS AS TO LIQUOR HABIT.**—Upon an appli-

94	253
120	295
120	297

94	253
f126	54

94	253
130	401
f131	94
d136	344

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cation for life insurance an inquiry as to whether the applicant is then temperate in his habits of drinking intoxicating liquors is material; and where a false statement of the applicant as to that matter is relied upon to avoid the policy, it is no answer upon his part to say that his habits were not such as to injure his health. But an inquiry in regard to previous habits of drinking intoxicating liquors is not material unless they existed to such an extent as to affect the health or physical condition of the applicant, and thereby render him an unsatisfactory subject for life insurance; and the court in this case properly so instructed the jury.

3. **EVIDENCE SUFFICIENT TO SUPPORT VERDICT.**—There being evidence conducing to support a verdict for plaintiffs, the court will not set it aside upon a mere preponderance of evidence in favor of the defendant.
4. **REFUSAL TO ALLOW WITNESS TO TESTIFY AFTER CLOSE OF TESTIMONY.**—As defendant, after discovering the absence of a witness who was present and sworn at beginning of trial, did not exercise proper diligence to coerce his attendance, the court did not abuse its discretion in refusing to permit the witness to testify upon his appearance in court for that purpose, after plaintiffs had closed their evidence, that of defendant having been previously given.

**BRECKINRIDGE & SHELBY FOR APPELLANT.**

1. Upon the issue made as to whether or not there had been any delivery of the policy and completion of the contract of insurance, the burden of proof was upon the plaintiffs, and it was error to assume in favor of the plaintiffs all the facts in issue upon this branch of the case, and then instructing them peremptorily as to the effect of those facts.
2. The testimony establishes the falsity of Rodes Thomson's statement, that at the time of his application he was not addicted to the habitual use of liquor, that his use of same was temperate, that his former habits in this respect were temperate, that he was, to the best of his knowledge and belief, in sound physical condition, and that he had not been attended by a physician for any thing serious within ten years prior to his application.
3. Defendant's motion for judgment *non obstante veredicto* should have been sustained. It stands confessed upon the pleadings that the false representation of the applicant in regard to his habits as to liquor was material to the risk, and was fraudulent. But even if not, the admitted fact that it was made and was false is sufficient of itself to avoid the insurance. The statement is to be taken as matter of law as a material one, wholly irrespective of the question whether the habit had in point of fact affected the applicant's health. (Civil Code, sec. 386; Gen. Stats., chap. 22, sec. 22; May on Insurance, secs. 195-6; *Idem*, sec. 299.)

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4. Where a material witness absents himself after the jury has been sworn, the party for whom he is summoned is entitled to a continuance. (*Coetigan v. Commonwealth*, 11 Ky. Law Rep., 617.)
5. In his application, Thomson stated that he was, to the best of his knowledge and belief, in sound physical condition, and a satisfactory subject for life insurance. In its instruction given upon the issue made as to this statement, the court, instead of telling the jury to find for defendant if Thomson was not, *to the best of his knowledge and belief*, in sound physical condition, &c., made the finding for the defendant upon this issue dependent upon the *actual fact* of Thomson's not being in sound physical condition, &c. This was error.
6. If the statement of Thomson that he had not been attended by a physician for any thing serious for ten years prior thereto, was a material one, and was untrue, the defendant was entitled to rely upon the falsity of it without reference to the question whether the applicant knew it to be untrue. It was error in instructing the jury to make the defendant's right to a finding upon this issue, dependent upon the fact that Thompson had *to his knowledge* been treated for such complaint. (*Germania Ins. Co. v. Rudwig*, 80 Ky., 281.)

## G. C. LOOKHART OF COUNSEL ON SAME SIDE.

## WM. LINDSAY FOR APPELLEES.

1. The acceptance of the application and the payment of the premium consummated the contract, and it was not material to the rights of the parties whether the policy was or not technically delivered to the insured before his death. If held by Cochran, the agent who had received the premium, he held it for the insured as matter of law.
2. The deposit in Sayre's Bank was the payment of the premium, and the court would have been in error to have failed to assume the fact of payment at the date of deposit.
3. The evidence was sufficient to authorize the finding of the jury that the representations of the insured as to his habits of intemperance were not false.
4. There was no necessity for replying to the amended answer; all its material averments being specifically denied by the original reply.
5. It was no abuse of discretion to refuse to permit the witness Haynes to testify when offered, as his testimony would have been merely cumulative.

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Margaret Thomson, widow, and Rodes, C. H. and C. E. Thomson, infant children of Rodes Thomson, now deceased, brought this action to recover of the



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Mutual Life Insurance Company of New York ten thousand dollars, which, by a policy on the life of the deceased, issued November 15, 1887, the defendant promised to pay the plaintiffs. And this is an appeal from a judgment for the amount sued for.

The two main grounds of defense to the action now urged by counsel are: First, that the policy had never been, in fact, delivered prior to death of the insured, and the contemplated insurance did not therefore take effect. Second. That the contract of insurance, even if completed, was rendered void by various false statements made by the deceased in his written application for the policy.

It appears that November 12, 1887, he applied to one Cochran, an insurance broker in the city of Lexington, for the purpose of procuring a policy of insurance from some company, and the amount of it, and of the first premiums, having been agreed upon, they went together to the office of Dr. Todd, who had been previously appointed by defendant as one of its medical examiners, by whom an examination of Rodes Thomson was then made, and a written application, embodying answers or statements by the physician as well as by Thomson, made out and signed by them. The application thus prepared was, on the same day, delivered by the physician to Buckley, authorized agent of defendant at Lexington, who had furnished the blank form, and by him sent to the principal office of the company in the city of New York. And November 15th, or in due course of mail thereafter, the policy in question was received by Buckley, and by him placed in the hands of Cochran, to

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be by him delivered to Rodes Thomson, amount of the premium having, in meantime, been put in bank to the credit of Cochran. It was, however, not delivered to Rodes Thomson, who died November 28th, but to his wife, subsequent to that event.

It seems to us the contract of insurance must, under such circumstances, be regarded as completed and binding on the parties before death of the assured, and that it was both the right and duty of Cochran to deliver the policy, as was done. For not only was it placed in his hands by Buckley for that purpose, but the latter received and appropriated to use of the company amount of the premiums that had been placed to credit of Cochran. The lower court did not, therefore, err in assuming and instructing the jury that the policy had been delivered.

The statements or answers to questions in the application, which it is alleged in the answer were falsely and fraudulently made by Rodes Thomson, are as follows: 1. That he had not previously any serious illness, constitutional disease or injury. 2. That he did not drink wine, spirits or malt liquors daily or habitually. 3. That to the question, if he drank, to what extent, the answer was temperate. 4. The same answer was given to the question as to his former habits of drinking spirits or malt liquor. 5. That he had not been attended by a physician for any serious cause for ten years. 7. That he never had any of certain enumerated diseases, including diarrhœa; and 8, that he was temperate in his habits, and, to the best of his knowledge and belief, in sound physical condition and satisfactory subject for life insurance.

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It is contended by counsel plaintiffs failed to deny an allegation in the answer that the statement of Rodes Thomson in regard to his former habits of drinking liquor was false and fraudulent, and that consequently the lower court erred in overruling defendant's motion for judgment notwithstanding the verdict.

It appears to us, after inspecting the transcript, that allegation was substantially denied; besides evidence on the issue was offered by both parties. But a question does arise whether the lower court correctly and full enough instructed the jury on that subject. The instruction bearing on that issue is as follows: "If the jury believe from the evidence that Rodes Thomson had a habit of intemperately using intoxicating liquors prior to his application for the insurance in question, and that such habit existed at such a time and to such an extent that it might reasonably have injured or impaired his health at the time of the application, then they should find for the defendant."

It is provided by section 22, chapter 22, General Statutes, that all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, and that no representations, unless material or fraudulent, shall prevent a recovery on the policy. Therefore, unless the fact of a former habit of using intoxicating liquors be considered a material inquiry at the time of an application for life insurance, whether his health may or may not thereby have been impaired or injured, the instruction quoted presented the issue on that subject fully and correctly.

It is of vital importance for an insurance company to know before issuing a life policy, whether the applicant is thus temperate in his habits, for obviously he would not be a fit subject for insurance, nor could a company prudently issue to him a life policy if he was not then temperate in his habits of drinking intoxicating liquor; and, consequently, if he had made a false statement in that particular, it would be no answer to say the habits were not such as to impair his health, because insurers have a right to protect themselves by guarding against the risk of pernicious habits. (May on Insurance, section 290.)

But it seems to us an inquiry in regard to previous habits of drinking intoxicating liquors is not material unless they existed to such an extent as to affect the health or physical condition of the applicant, and thereby render him an unsatisfactory subject for life insurance.

The issues involved as to verity of each one of the other statements made by Rodes Thomson in his application for the policy were, we think, fully and correctly presented by instructions to the jury. But it is earnestly contended the verdict is, in language of counsel, such a monstrous perversion of justice that we should set it aside. The rule by which this court has been uniformly governed in revising the verdict of a jury is, that it must be flagrantly against the evidence to justify setting it aside. We do not, therefore, say whether the verdict in this case is such as this court would have rendered upon the bill of evidence as presented. It is sufficient that, in our opinion, there is evidence conducing to support it,

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and it may be if we had heard the evidence face to face with the witnesses our finding would not have been different from that of the jury. The most important witness for the defendant on the trial was the grandfather of the infant plaintiffs, two of his sons also testifying to the same purpose; and not only did he exhibit an apparent desire for defendant to succeed, but it appears probable the insurance company would not have resisted payment of the policy but for his voluntary and active interference. It is not, therefore, surprising that the jury failed to give full credit to witnesses occupying such a hostile and unnatural attitude as did the grandfather and his two sons, who came from adjoining counties to testify against their nephew.

There being evidence showing, or tending to show, that Rodes Thomson was, at the time he made the application, a man of temperate habits, in sound physical condition, and a satisfactory subject for life insurance, we do not feel authorized to disturb the verdict upon what, at best, is a mere preponderance of the evidence in favor of the defendant.

Another ground for reversal is refusal of the court to permit a witness for defendant to testify, who appeared in court for that purpose, after plaintiff had closed their evidence, that of defendant having been previously given, upon the issue in regard to statements of Rodes Thomson in his application for the policy. Although that witness was present and sworn at beginning of the trial, we think the ruling of the court was not an abuse of discretion; for defendant did not exercise proper diligence to procure the co-

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erced attendance of the witness after discovering his absence. His testimony, as shown by defendant's affidavit, would have been simply cumulative, and, as stated by the judge, economy of time was necessary in order to complete trial of the case before expiration of that term of court.

It seems to us the issues of fact were properly presented to the jury, by instructions of the court, and as there was no error of law to the prejudice of defendant's right, the judgment must be affirmed.

94	261
95	319

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## Carter v. Mitchell, Ass'ee.

APPEAL FROM HICKMAN COURT OF COMMON PLEAS.

WHERE THE NAME OF ONE OF SEVERAL MEMBERS OF A FIRM IS SIGNED TO A NOTE, THE FIRM MAY BE HELD LIABLE on the note upon parol proof that all the members of the firm assented to the signing of the note in this way in order to raise money for the firm, and that credit was given to the firm. Therefore, in an action against the firm upon such a note indorsed by the firm it is immaterial whether such steps were taken as were necessary to hold the members of the firm liable as indorsers, they being liable as makers.

GEO. L. HUSBANDS FOR APPELLANT.

The indorsement of the name of Bowers & Carter on the note fixed their liability as assignors if it was a simple promissory note, or as indorsers if it had been placed on the footing of a foreign bill of exchange; and to admit parol testimony of any other liability is to change that evidenced by the indorsement. (*Macklin v. Crutcher*, 6 Bush, 401.)

The case of *Smith v. Turner's Adm'r*, 9 Bush, 417, distinguished.

J. C. FLOURNOY FOR APPELLEE.

It is a question of fact, and not of law, whether the individual note of one

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partner was an individual or a firm obligation, where that point is in issue; and the court in this case properly submitted the question to the jury. (Owing & Co. v. Trotter & Scott, 1 Bibb, 157; Macklin's Ex'or v. Crutcher, 6 Bush, 401; Smith v. Turner, 9 Bush, 417; Spalding, &c., v. Wilson & Muir, 80 Ky., 595.)

## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This action was instituted by R. A. Mitchell, as assignee of the Fulton Bank, against C. T. Bowers and the firm of Bowers & Carter, on a note executed to the bank for five thousand dollars on the 18th of March, 1890, and payable six months after date. The note is signed by C. T. Bowers and indorsed by the firm of Bowers & Carter. The blank indorsement was filled up by a promise to pay on the part of the firm, if not paid at maturity. John Carter, a member of the firm, is, by an appropriate pleading, denying the right of the cashier to fill up the blank, and in the determination of this case, we will consider the writing as it was indorsed originally by the firm. Carter's defense is that the note was the debt of Bowers; that there was no protest of the paper, and that the firm of Bowers & Carter indorsed the paper as assignor only, and is not liable for the debt.

By amended pleadings, it is alleged that the debt was primarily that of the firm; the money borrowed for firm purposes, placed to the firm's credit and checked out by Carter to pay the firm debts; that the paper was drawn in the manner suggested by the cashier at the time, and a mortgage taken on some land of Bowers as security, the firm being in no condition to offer, or at least not offering, other surety on the paper.

The testimony, it seems to us, is conclusive of the

fact that it was a firm debt, and the proceeds of the note, except a small sum, appropriated by Carter, the appellant here, by his checks on the bank, to pay the firm debts. The bank had been honoring their paper, and the note for five thousand dollars was to enable them to pay off debts then in bank already due and other debts owing by the firm. Carter's testimony is to the effect that this was a borrowing by Bowers to enable him to furnish his part of the capital for the proper conduct of the firm's business, but this view of the case is repelled by the letters of Carter written after the note fell due, recognizing his obligation to pay, and in fact is contradicted by every fact and circumstance connected with the transaction.

It is insisted, however, that the writing speaks for itself, and to make this a firm debt, is to change the nature of the obligation it imposes on the parties to it. The case of *Macklin's Executor v. Crutcher*, reported in 6 Bush, 402, is relied on as sustaining this contention. In that case Macklin & Ferguson were partners in cultivating cotton, Ferguson acting as manager of the plantation. Ferguson purchased some mules, stating at the time they were for the use of the plantation, and executed his individual note for the price. Macklin having died, his executors were sued on the note. The plaintiff alleges that the stock was used on the plantation, and that the name of the firm was "*W. F. Ferguson.*" The averments of the petition were controverted, and upon the hearing it appeared that Ferguson bought mules on his own account, and that the firm name was Macklin



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& Ferguson, and no authority had been given Ferguson to bind Macklin in any other way than under the firm name; that he had never ratified the notes or offered to pay them. This note did not purport to bind Macklin or the firm, and it may be that, in the entire absence of any proof authorizing the firm name to be signed as Ferguson signed it, with no testimony showing a ratification or approval by Macklin of the right of Ferguson to make the firm liable in that mode, the proper remedy was an action against the firm on the original consideration for the sale and delivery of the mules for the use of the firm, and upon the credit of the firm. Such was the decision in *Macklin v. Crutcher*, and that case is not in conflict with the view taken of this case in the trial below. In the overruled case of *Hikes v. Crawford & Long*, 4 Bush, 19, it was held that a note signed by one of the partners made it a firm obligation if the note or its proceeds was used for the firm; and this is no longer the law, for in that case the partner sought to be made liable never assented to its execution in that mode, or ratified the act of his co-partner.

In the present case, when this note was executed, both of the partners were present, and both not only represented that the note was a partnership transaction, but the proceeds were to be used for partnership purposes, and were, in fact, applied in that way by Carter; the appellant, who is now resisting the recovery on the ground that the paper fixes the liability of the parties; and while that is generally so, the rule does not apply to a case where one partner signs a

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paper on the representation to the bank or the lender that it is for the partnership, and the other partner present assents to the signing for that purpose—that is, to enable the partnership to get the money. It is immaterial, therefore, whether the firm name was on the note as obligors or indorsers. The instrument was executed for the firm and in the presence of both members, and the proceeds used for that purpose, and so declared by both partners when the money was obtained.

The liability of partners upon paper signed by one in the name of the firm arises from an implied consent or authority to use the firm name for that purpose; and if there is an express assent by all the members of a firm that the name of one individual member shall be used, and not that of the firm, to raise money for the use of the firm, we see no reason why the partnership is not liable when the credit is given to the firm.

This paper was drawn up to answer the purposes of the firm, and if there had been no indorsement by the firm, but the paper signed only by Bowers, Carter consenting thereto, and the bank letting out its money on the credit of and to the firm, evidenced by the note signed in that manner, the firm would be liable; and to make it stronger, they place on the back of the note the firm name, and say to the cashier, we want this money for firm purposes, and upon the faith of these statements the proceeds are placed to the firm's credit. The name of Bowers gave no additional strength to the paper. The firm was composed of two persons only, Bowers and Car-

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ter, and the mortgage given by Bowers was to secure the firm debt, not the individual debt of Bowers.

The instructions properly presented the case to the jury, and the verdict and judgment is sustained by the testimony. Affirmed.

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CASE 41—INDICTMENT—APRIL 27.

Riley v. Commonwealth.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **INSTRUCTION AS TO SELF-DEFENSE.**—Upon a trial for murder, there being no testimony tending to show that the accused sought or provoked the difficulty, it was error to give any instruction upon that hypothesis. But even if the evidence authorized an instruction of that character, it was misleading to tell the jury they could not acquit upon the ground of self-defense, if they believed "from all the evidence," that immediately before the shooting "the defendant, by his own wrongful acts then and there done by him," gave the deceased reasonable grounds to believe that his life was in danger, as the instruction intimates that defendant's acts were wrongful; and, besides, requires the jury to believe only from a preponderance of the evidence, and not to the exclusion of a reasonable doubt, the facts that are said to be sufficient to deprive defendant of the right of self-defense.
2. **SAME.**—The court properly refused an instruction to the jury on the subject of defendant's right to pursue the deceased, as the testimony does not, in fact, show pursuit.
3. **SAME.**—The evidence did not authorize an instruction requiring defendant to seek some "reasonable means of escape from the impending peril" before using the necessary or apparently necessary means at hand to protect himself.
4. **EVIDENCE.**—As the defendant had been informed of threatening language used by deceased, and there was some proof tending to show the deceased had, in anger, sought him, and the Commonwealth was allowed to show that deceased had no pistol on his person at the time of the killing, it was competent for defendant to show that deceased was a man of violent temper, and was in the habit of carrying concealed weapons just prior to the shooting.

## Riley v. Commonwealth.

5. **SAME.**—Testimony showing the feeling and mental condition of deceased at or near the time he had a conversation which was brought out by defendant was competent, as it was closely interwoven with that conversation and formed a part of the transaction.

**BUTLER HAWKINS FOR APPELLANT.**

1. The court erred in qualifying the instruction as to self-defense, as the qualification was not only unsupported by any evidence, but was misleading, in that it assumed that Riley had done an unlawful act.
2. If the qualification was otherwise proper, it was error not to require the jury to believe *to the exclusion of a reasonable doubt* the facts they were told would be sufficient to deprive defendant of the right of self-defense. (Allen v. Commonwealth, 86 Ky., 642; 10 Ky. Law Rep., 148.)
3. The instruction as to defendant's right to pursue his adversary should have been given. (1 East, P. C., 271, 278; Holloway v. Commonwealth, 11 Bush, 344; Luby v. Commonwealth, 12 Bush, 1; Sutherland v. Commonwealth, 3 Ky. Law Rep., 474.)
4. The court should have admitted the testimony showing that deceased was a man of violent temper and was in the habit of carrying concealed weapons. (Payne v. Commonwealth, 1 Met., 379.)
5. Helm should not have been allowed to testify as to the feelings of deceased just after his interview with Blakeley.

**NELSON & DESHA, JNO. S. ROEBUCK OF COUNSEL ON SAME SIDE.****W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

Brief not in record.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Upon an indictment against him for murder, Thomas Riley was convicted of manslaughter and sentenced to confinement in the penitentiary for the term of five years.

On appeal to this court he complains, *first*, of so much of instruction No. 4 as sought to restrict, and as he alleges, destroy his right of self-defense.

After giving the usual instruction on that subject, the court added this instruction: "If the jury, however, believe from all the evidence, that immediately be-

fore the shooting, the defendant, by his own wrongful acts then and there done by him to the said Chas. J. Jungerman, caused the said Jungerman to believe and give him reasonable ground to, in good faith, believe that the said Jungerman was in immediate danger of losing his life, or of suffering great bodily harm at the hands of said defendant, and that said Jungerman, while so believing, used toward defendant such necessary, or apparently necessary, means as were at hand to protect himself from such impending peril, and in so doing put the defendant in danger or apparent danger, then the defendant may not avail himself of such danger or apparent danger to excuse himself in taking the life of said Jungerman."

Even if this were a case in which an instruction of this character should have been given, the form of it is objectionable and misleading. It clearly intimates, if it does not, in fact, assume, that the acts of the defendant, immediately before the shooting, were "wrongful acts, then and there done by him" to the deceased, and, moreover, the state of case in which he is deprived of the right to defend himself from impending danger, is made to depend on the jury's belief from the evidence, or a preponderance thereof, and not on the evidence to the exclusion of a reasonable doubt. (*Allen v. Commonwealth*, 86 Ky., 642.)

But this is decidedly not a case in which such an instruction should have been given in any form. There is no evidence whatever to justify it. The defendant did not seek or bring on the difficulty or "provoke" it. So far as the proof on this trial

shows, he committed no act by which he robbed himself of the right of self-defense.

We do not think that, in this case, the instruction asked for by the defendant and refused by the court on the subject of defendant's right to pursue the deceased, should have been given. The testimony does not, in fact, show pursuit. It does appear that the defendant came out of the hallway where he had been violently assaulted and seriously wounded on the head by the deceased after the deceased came out, but after coming out, and before drawing his pistol, he stopped and was standing still when the deceased rushed on him from behind a tree. The whole transaction occupied but a few moments of time.

Nor do we think that this is a case in which the instruction should have been given requiring the defendant to seek some "reasonable means of escape from the impending peril" before using the necessary, or apparently necessary, means at hand to protect himself. The undisputed fact is that the deceased first assaulted the accused with a cane and seriously wounded him. When he became conscious after the blow, he came forward and out of the house, as he had the right to do. It might have occurred to the jury that the instruction required the defendant to flee, or do some equally cowardly act not in keeping with the right of self-defense, and not, in fact, required by any just principle of law.

The defendant complains also because he was not allowed to show the well known habit of deceased as to carrying a pistol just prior to the shooting, and

that his reputation was that of a violent man with an ugly temper. On the authority of *Payne v. Commonwealth*, 1 Met., 379, we think this testimony was admissible. The deceased had used threatening language toward the defendant, of which he had been informed, and there was some proof tending to show that he had sought him in anger, and the Commonwealth was allowed to show that he had no pistol on his person at the time of the fatal encounter. In view of all the facts in this case, we think it was competent to show that the deceased was a man of violent temper and was in the habit of carrying concealed weapons just prior to the shooting.

We think that the testimony of Helm, showing the feeling and mental condition of the deceased at or near the time he had the talk with Blakeley, brought out by the defendant, was competent. It was closely interwoven with the Blakeley interview and formed a part of the transaction.

For the error in giving the instructions named and in excluding the testimony indicated, the judgment is reversed, and case remanded with instructions to proceed in accordance with this opinion.

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Mercantile Trust Co. v. South Park Residence Co.

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CASE 42—PETITION EQUITY—APRIL 27.

## Mercantile Trust Co. v. South Park Residence Co.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. **VOID JUDGMENT—WARNING ORDER.**—Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal statute.
2. **A COVENANT OF SEISIN** is satisfied only by the transfer of an indefeasible title, and is technically broken as soon as it is made if the title be from any cause defeasible. Therefore, an action for the breach lies at once and before eviction.
3. **A MORTGAGE IS A MERE SECURITY FOR DEBT**, and, substantially, both at law and in equity, the mortgagor is the real owner of the property mortgaged.
4. **THE MEASURE OF RECOVERY FOR BREACH OF COVENANT OF SEISIN** is the consideration paid with interest, the recovery being only *pro tanto* where the breach of the covenant is only partial; and where there has been an eviction, the covenantor is also liable for the legal costs incurred in resisting the eviction and for a reasonable fee paid to counsel in defending the action. But where there has been no eviction, the vendee having purchased the outstanding title, there can be no recovery of attorneys' fees paid or expenses incurred in obtaining the title.

### MARC MUNDY FOR APPELLANT.

1. The unsatisfied mortgage barred an eviction of the purchaser in possession, and appellee's voluntary surrender by purchasing the rights of outside claimants was an unlawful surrender. While it was not necessary for appellee to wait until ousted by judgment and writ of possession, yet he should have waited until action was brought wherein appellant might have been substituted to defend. (*Hamilton v. Cutts*, 4 Mass., 350; *Rawle on Covenants for Title*, pp. 264, 265; *Sprague v. Baker*, 17 Mass., 590; *Dupuy v. Roebuck*, 17 Ala., 488.)

By a conveyance of mortgage, the fee vests in and remains in the mortgagee until satisfaction of the mortgage, though held for security only. (*Fitzhugh v. Croghan*, 2 J. J. Mar., 488; *McGoodwin v.*



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Stephenson, 11 B. M., 21; Rawle on Covenants for Title, p. 868; Bartlett v. Borden, 13 Bush, 47.)

2. If the grantor was seized in fact, though not of an indefeasible estate, then the covenant of seisin is not broken. (*Bachus v. McCoy*, 3 Ohio, 211; *Forte v. Burnett*, 10 Ohio, 327; *Devore v. Sutherland*, 17 Ohio, 60; *Rawle on Covenants*, p. 68; *Blanchard v. Cushman*, 2 Greenleaf, 268.)
3. The fact that the court erred in directing the warning order does not divest the purchaser at decretal sale of title to the land. (*Yocum v. Foreman*, 14 Bush, 494.)

The judgment was erroneous only and not void. (*Bullitt v. Commonwealth*, 14 Bush, 74; *Dorsey v. Kendal*, 8 Bush, 294; *Benningfield v. Reed*, 8 B. M., 102; *Beasley v. Doty*, 3 Dana, 82.)

**STONE & SUDDUTH FOR APPELLEE.**

1. The decree of the Federal court is void, and the sale made pursuant thereto conferred no rights on the purchaser as to the interest of the six absent defendants. (*Hunt v. Wickliffe*, 2 Pet., 214; *In re King* 7 Nat. Bankrupt Register, 279; *Brownfield v. Dyer*, 7 Bush, 506; *Gray v. Larrimore*, 4 Sawyer, 645; *Cissel v. Pulaski County*, 3 McCreary, 446.)
2. The covenant of seisin is broken the instant it is made, if at that time the grantor did not have good title, and a suit may be maintained for a breach of the covenant before and without any eviction. (*Fitzhugh v. Croghan*, 2 J. J. Mar., 438; *Rawle on Covenants*, 4 ed., p. 83.)
3. A covenant for seisin is satisfied only by the transfer of an indefeasible title. (*Howell v. Richards*, 11 East, 641.)
4. The grantee is not bound to wait until he has been disturbed in his possession, but may purchase in the outstanding title and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same. (*Warvelle on Vendors*, vol. 2, p. 988; *Anderson v. Kuon*, 20 Ala., 156; *Berry v. Berry*, 9 B. M., 487; *Vanmeter v. Griffith*, 4 Dana, 90; *Rawle on Covenants*, pp. 289, 175.)

And he may also recover his necessary costs, including a reasonable attorney's fee. (*Robertson v. Lemon*, 2 Bush, 301; *Warvelle on Vendors*, vol. 2, p. 1010.)

5. A mortgage is simply a security to the mortgagee for his debt, and the mortgagor still remains the owner. (*Jones on Mortgages*, vol. 1, sec 81; *Woolley v. Holt*, 14 Bush, 788; *Douglass v. Cline*, 12 Bush, 608; *Taliaferro v. Gay*, 78 Ky., 496.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Mrs. Dorcas White was the owner of a tract of some three hundred and eighty acres of land near

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Louisville, Kentucky. In 1875 her son, Theodore S. White, borrowed from the Mercantile Trust Company of New York the sum of five thousand dollars, and Dorcas and her husband, by way of mortgage, conveyed the land named to the Trust Company to secure the payment of this debt. The loan was made on five years' time, but the interest not being paid, in March, 1878, the company instituted proceedings in the circuit court of the United States for the District of Kentucky, seeking to subject the lands to the payment of its debt. Prior to this suit Dorcas White had died, and the action was against her children, *eight* in number, six of whom were residents of the State of Arkansas. Only two of them were found in the district, and thereupon an order of warning was made against the six children, and, after publication for *ten successive days* in a daily paper in Louisville, a judgment of sale was obtained. A receiver had theretofore been appointed by the court, who had taken charge of the property. At the commissioner's sale in September, 1878, the company became the purchaser at the price of four thousand four hundred dollars, and in November, 1888, the sale was confirmed, and a deed made to the company.

On November 17, 1888, the Trust Company sold and conveyed the property to Peddicord in consideration of the sum of four thousand dollars, and thereafter, in August, 1889, Peddicord sold and conveyed the same property to the South Park Residence Company in consideration of the sum of nineteen thousand four hundred and fifty-six dollars and fifty-six

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cents. In the deeds from the Trust Company to Peddicord and from Peddicord to the South Park Residence Company, these covenants are found: "And the said first party further covenants with the said second party, his heirs and assigns, that they are lawfully seized in fee-simple of the property herein conveyed; that they have good right and full power to convey the same; that said property is free from incumbrance, and the said first parties and heirs shall make all further assurance of the lands as shall be lawfully and reasonably required by said second party, his heirs or assigns."

The only title that the Trust Company had to the property was by virtue of the Commissioner's deed obtained in the United States Circuit Court proceeding named above; and in that suit the Federal Statute of March 3, 1875 (Sup. to U. S. Rev. Stat., vol. 1, page 176), requiring orders of warning to be published in such manner as the court may direct, not less than *once a week for six consecutive weeks*, was ignored, and publication was made for only ten successive days. It follows, therefore, that the interest of six out of the eight children of Dorcas White was sold, or attempted to be sold, when they were not before the court. Upon the authority of *Hunt v. Wiokliffe*, 2 Peters, 214-15, and other cases of the United States Supreme Court to the same effect, we are of opinion that this jurisdictional fact not appearing of record—that is the publication required by law—the decree and sale thereunder did not divest the title of the six children in and to the land sold, but that as to them the judgment was absolutely void.

Therefore, at the time of the conveyances from the Trust Company to Peddicord, and from the latter to the Residence Company, these six children as heirs of their mother, Dorcas, were the owners of six-eighths of the property, and hence, the covenants of the first parties to said deeds that "they were lawfully seized in fee-simple of the property therein conveyed, and that they had good right and full power to convey the same," were broken immediately upon the making of them.

In *Fitzhugh, &c., v. Croghan*, 2 J. J. Mar., 429, it is said: "In a suit on a covenant of *seisin*, the only question is, was the covenantor *seized* of the legal title at the instant when he made the covenant? If he were, his covenant is not broken. It is a covenant '*in presenti*,' and can not be affected by supervenient facts or events. \* \* The covenant of *seisin* is broken the instant it is made, or never." Mr. Rawle in his work on Covenants for Title, page 81, says that the weight of authority is to the effect that a "covenant of *seisin* is satisfied only by the transfer of an *indefeasible* title," and is "technically broken as soon as it is made, if the title be, from any cause, defeasible."

Mere possession, we think, does not satisfy the covenants of the grantors. The *right* of possession must also have been in them as well as the fee and the right to convey.

It is insisted that the mortgage of the Whites passed the fee to the Trust Company, and that it was thus seized in fee, and empowered to convey in satisfaction of its covenant. It is true that in some

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comparatively late cases (see *Stewart v. Barrow*, 7 Bush, 368) it is said that "a mortgage passes the legal title to real estate to the mortgagee," which follows the old doctrine. But in all the late cases (see *Taliaferro, &c., v. Gay, &c.*, 78 Ky., 496) the principle is announced that "substantially under the adjudications in this State, the legal title to the mortgaged premises, both at law and in equity, remains in the mortgagor during the life of the mortgage." "A mortgage is a mere security for debt, and substantially, both at law and in equity, the mortgager is the real owner of the property mortgaged." (*Woolley v. Holt*, 14 Bush, 790.)

In *Douglass, &c., v. Cline, &c.*, 12 Bush, 612, it is said: "Hence mortgages are now treated in this State as mere securities, and although, strictly speaking, the mortgagee is invested with the legal title, he holds it only in pledge, and the mortgagor is considered, both at law and in equity, the real owner of the property."

It is manifest, therefore, that the Trust Company was not the real owner of six-eighths of the property in question; was not "lawfully seized in fee" thereto, and had not the good right and full power to convey the same, either by virtue of its mortgage from the Whites, or by reason of its commissioner's deed in the foreclosure proceedings aforesaid. Nor need an eviction first be had before an action was maintainable. This follows from the very nature of the covenants. If ever broken, they are broken as soon as made, and an action for the breach lies at once, and before eviction.

In *Fitzhugh, &c., v. Croghan supra*, it is said: "A suit may be maintained, therefore, for a breach of a covenant of *seisin* before and without any eviction." See, also, *Rawle supra*, page 77, to the same effect.

In *Warvelle on Vendors*, vol. 2, p. 988, it is said: "The grantee is not bound to wait until he has been disturbed in his possession, however, but may purchase in the outstanding title, and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same."

We conclude, therefore, that the South Park Residence Company had the right to institute this action against the Trust Company, the covenantor in the deed of November 17, 1888, and do so before actual eviction.

This brings us to the consideration of the question what is the measure of damages in the case? Upon discovering the defect of title, which was in the latter part of the year 1889, the appellee, the South Park Residence Company, at once notified the Trust Company, and upon the latter company taking no steps to perfect the title, it proceeded to buy in the outstanding title of the six White heirs.

The land had greatly advanced in value, as is shown by the fact that Peddicord sold it for nearly five times as much as he paid for it, and besides extensive improvements had been erected thereon.

This title was finally bought in at the price of seven thousand two hundred dollars, paid by the South Park Residence Company, and the proof is abundant that the price paid was reasonable. Peddicord, the immediate grantor of the appellee, con-

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sented to this purchase and immediately paid to his grantee one-half of the sum it thus had to pay to the Whites, namely, three thousand six hundred dollars, and transferred to the appellee all interest and claim he might have growing out of the Trust Company's covenant to him in the deed of November, 1888. The latter company declining to make good the remainder of the loss growing out of the purchase of this outstanding title, the South Park Residence Company brought this suit, in which Peddicord nominally joins, against the Trust Company. It recovered a judgment for the sum claimed, to wit, three thousand six hundred dollars, with interest from January 25, 1890, and for five hundred and fifty dollars for attorneys' fees and expenses incurred and paid, in the obtention of the outstanding title of the White heirs.

In *Cox's Heirs v. Strode*, 2 Bibb, 273, it is said: "The Supreme Courts of New York and of Pennsylvania have determined that on a covenant of seisin the rule of compensation is the value of the land at the time of entering into the covenant, to be ascertained by the consideration paid, with interest and costs attending the eviction." This rule is unqualifiedly endorsed, and has since been invariably followed. (See *Cosby v. West*, 2 Bibb, 568; *Thompson's Heirs v. Jones*, 11 B. M., 365.)

In *Robertson v. Lemon and Wife*, 2 Bush, 301, where there was an eviction and a suit on a breach of general warranty, the same rule is announced, and it was said: "The appellant is certainly liable for the legal costs incurred in resisting the eviction,

and also for a reasonable fee paid to counsel for defending the action. \* \* \* That the legal effect of such a warranty as that in this case is the liability of the warrantor for a restitution *pro tanto* of the consideration, is indisputably established by preponderating authority and by this court."

In Rawle, *supra*, page 992, it is said that "the doctrine is well established that where the breach of a covenant is only partial, the covenantee recovers *pro tanto* only." Warvelle, in his work on Vendors, page 1011, says that "it has been held in some instances that the allowance of a counsel fee is conditional upon the action of the covenantor, and the covenantee can not recover the fees paid by him involuntarily defending the ejectment suit as part of his damages in an action against the covenantor on the covenants of title."

Rawle, *supra*, page 310, says: "In some cases, however, counsel fees have been denied under any circumstances, it being considered that these expenses incurred by the party for his satisfaction vary so much with the character and eminence of counsel, that it would be dangerous to impose such a charge upon an opponent."

Whatever may be the rule elsewhere, we think it is authoritatively settled in Kentucky, that in suits for a breach of covenants of this character the necessary costs and expenses incurred in defending the title, including a reasonable attorney's fee, can be recovered; but we think these expenses must have been incurred in actually defending the suit for eviction, and after notice of the suit to the covenantor



If he is to be made liable, he must at least be given the opportunity to employ his own counsel and provide the defense, the cost of which he is to pay.

In this case there was no suit for eviction; the covenantee voluntarily undertook to buy in the paramount title of the Whites. Notice of the defect was first given the Trust Company in New York the latter part of November, 1889, and even then negotiations were pending between the Park Company and the Whites respecting the purchase of their claim, and was very shortly closed. The Park Company was evidently greatly alarmed at having expended some forty or fifty thousand dollars on property to only two-eighths of which they had title. It was evidence of business capacity to hurry the trade through, but we do not think the Trust Company should be held liable to this expense. It is contended by the appellant that from whatever sum is fixed the compensation due to the appellee, should be deducted the balance of the unpaid White mortgage, as in no event could they have obtained an eviction without paying this unpaid balance. This is probably true, but it does not follow that this sum should be deducted from damages incurred by the appellee. The Whites probably estimated this unpaid balance as paid or satisfied, in selling their interest at less than the market value of the property, and such view is borne out by the proof.

We conclude, therefore, that the limit of the damages recoverable in this action is six-eighths of the consideration received by the Trust Company from Peddicord on November 17, 1888, that being the pro-

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porportionate loss or defect in the lands conveyed, which is three thousand dollars, with interest from the last-named date.

The judgment of the lower court being in excess of this sum is reversed, and cause remanded, with directions to enter judgment in accordance with this opinion.

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## CASE 48—INDICTMENT—APRIL 29.

## Taylor v. Commonwealth.

## APPEAL FROM LAUREL CIRCUIT COURT.

**OBTAINING PROPERTY BY FALSE PRETENSES.**—One who falsely pretends, by the printing of a false letter-head, to be a regular merchant, and thereby fraudulently obtains the property of another, is guilty of the statutory offense of obtaining property by false pretenses.

**EWELL & SMITH FOR APPELLANT.**

1. As the two writings exhibited by the witness Karr were not mentioned or described in the indictment, the court should have excluded them from the jury. (*Glackan v. Commonwealth*, 3 Met., 284; Criminal Code, sec. 124.)
2. To constitute the offense of obtaining money by false pretenses, the false pretense must consist of some past occurrence or some present existing fact. No statement of any thing to take place in future is a pretense within the meaning of the law. (*Glackan v. Commonwealth*, 3 Met., 284; *Archbold's Crim. Practice*, vol. 2, 465; 2 *Bishop on Crim. Law*, 845; 2 *Russell on Crimes*, 305; *Wharton's Crim. Law*, 727; *Commonwealth v. Haughey*, 8 Met., 228.)
3. Where the party claiming to be defrauded was placed in possession of the means of detection, an indictment will not lie. (*Grady v. Commonwealth*, 18 Bush, 285.)

**W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

The acts charged in the indictment are sufficient to constitute the offense of obtaining money by false pretenses. (2 *Bishop on Crim. Law*, secs. 151, 155, 415, 438; *Commonwealth v. Van Tuyl*, 1 Met., 1.)

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JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In the indictment under which he was convicted, appellant is charged with the offense of obtaining money and property under false pretenses, committed in the following manner: That he, John Storms and E. B. Storms, conspired and confederated to defraud and obtain flour and meal from the firm of Galloway & Burnam, dealing by wholesale therein at Paint Lick, and for that purpose did make, forge and print the following words and figures on paper in the style of a business letter-head, viz: "Office of E. B. Taylor, dealer in dry goods, clothing, boots and shoes, family groceries, furniture, &c., six miles west on Laurel river, Corbin, Kentucky," when, in fact, no such firm as E. B. Taylor existed at the time, and said E. B. Taylor was not a dealer in any of the articles named in the letter-head. That after said false letter-head was made the defendants did, on February 2, 1893, and in furtherance of said conspiracy, willfully and feloniously, and for the purpose of fraudulently obtaining money and property from Galloway & Burnam, write an order to them as follows:

"Office of E. B. Taylor, dealer in dry goods, clothing, boots and shoes, family groceries, furniture, &c., six miles west on Laurel river, Corbin, Ky. Keary, Ky., 4-2, 1892. Messrs. Galloway & Burnam: You will please send me the following: 500 pounds best flour, and ten bushels corn meal. Ship to Lilly, Ky. Yours resp., E. B. Taylor. I will refer you to W. W. Storms, Keary. Please send on 30 days time."

It is further charged that said order was for-

warded by mail to Galloway & Burnam at Paint Lick for the purpose aforesaid; and thereby defendants obtained, and Galloway & Burnam were induced and did send to the address of E. B. Taylor, the quantity of flour and meal as requested in said order, and of the value of seventeen dollars and twenty-five cents.

The evidence fully supports the statements contained in the indictment. And the only question is whether the facts so alleged and proved, constitute an offense for which appellant can be punished. Section 2, article 13, chapter 29, General Statutes, provides as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain from another, money, property or other thing which may be the subject of larceny; or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

"A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." (Sec. 151, vol. 1, Bishop on Criminal Law.)

The fact falsely represented in this case, and which was intended, adapted to, and did induce Galloway & Burnam to part with their flour and meal, was that E. B. Taylor had an establishment for the purpose, and was then and there a merchant and dealer in the articles mentioned in the letter-head. With-

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out that letter-head, Galloway & Burnam would not have parted with their property, nor could the defendants have obtained it, as was done, without a cash payment. For by that token or statement, either of which may be regarded as within meaning of the statute, Galloway & Burnam were induced to believe E. B. Taylor, a stranger to them, would pay them for their property at the time indicated, and consequently to give him credit therefor, which it fully appears they would not have otherwise done. We have thus a case where a person, by falsely pretending to be a regular and established dealer in dry goods and other articles, usually kept by a regular merchant, has fraudulently obtained the property of another, and is, therefore, guilty of the offense described in the statute quoted. For the letter-head, independent of the mercantile style in which the order for the flour and meal was written, did accomplish the fraudulent purpose intended, just as effectually as if there had been a plain and direct statement of the fact of which the letter-head was a token.

There is evidence that the father of appellant afterwards paid to Galloway & Burnam price of the flour and meal, but that did not operate to condone the offense, which was completed when the property parted with by Galloway & Burnam was obtained by the defendants.

Judgment affirmed.

## Barnard v. Commonwealth.

CASE 44—INDICTMENT—APRIL 29.

## Barnard v. Commonwealth.

APPEAL FROM LAUREL CIRCUIT COURT.

**CRIMINAL LAW—DEGREES OF OFFENSE.**—Under an indictment for an "assault with intent to rob" the court should, if the evidence authorizes it, instruct the jury as to the offense of a common assault and battery.

**WM. H. HOLT FOR APPELLANT.**

The court should have instructed the jury as to the offense of assault and battery, that offense being included in the one charged in the indictment. (Criminal Code, secs. 262, 264.)

**W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

Under the Code of Practice, the offense of assault and battery is not a degree of the offense of assault with intent to rob. (Criminal Code, sec. 265.)

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

The appellant Barnard was indicted, tried and convicted of the crime of assaulting Patrick D. Casey with intent to rob him. The court, upon the trial of the case, instructed the jury correctly as to the crime of an "assault with intent to rob;" but the appellant contends as the offense of a common assault and battery, a mere breach of the peace, is a degree of the crime of an "assault with intent to rob," and is included in that charge, that the court, the evidence authorizing it, should have instructed the jury that they might find him guilty of the misdemeanor. There was some evidence before the jury that tended to show that the offense of the appellant was that of a common assault and battery only. Therefore, the question is, should the court have given an instruction

94	285
94	530

94	285
108	206

94	285
128	822

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authorizing the jury to find the appellant guilty of that offense only?

Section 264, Criminal Code, seems to settle that question: "If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or with part only, is included in the offense, although that charged may be a felony, and the offense, without the circumstances, a misdemeanor only."

Here the crime of assaulting with intent to rob can not be made out without establishing an assault or assault and battery with such intent; and if the assault is committed without the additional circumstance of an intention to rob, then the assault is but a mere misdemeanor. But the intent to rob, and a conviction for it, absorbs the misdemeanor into the higher crime of felony; so likewise the higher crime of murder absorbs the offense of the mere assault and battery. But if the murder be not established, the party may be punished for the assault and battery, and if the person was not convicted of the assault with intent to rob, but committed a common assault and battery, he may be found guilty of misdemeanor, because it is but a degree of the crime of assault with intent to rob.

As the case must be remanded for a new trial, we will make no remarks upon the evidence further than indicated.

The judgment is reversed, and the cause is remanded for a new trial.

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Lackat, &c., v. Lutz.

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CASE 45—PETITION ORDINARY—APRIL 29.

## Lackat, &amp;c., v. Lutz.

94	287
1134	827
124	829

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

THE MASTER IS NOT LIABLE FOR THE ACT OF HIS SERVANT in directing a stranger into a dark room on the premises not used as a passage way for strangers; and if the stranger is there injured by stepping into an unguarded opening in the floor he can not recover of the master. And although the stranger may have been seeking the master for the purpose of delivering to him a message from one of his employes, he is to be treated as a mere intruder, so far as the duty or care owed him by the master is concerned.

KOHN, BAIRD &amp; SPECKERT FOR APPELLANTS.

No brief in record.

M. A., D. A. &amp; J. G. SACHS FOR APPELLEE.

The non-suit was correct. There was no contract, and no public or private duty, on the part of defendant that the premises should be in any other condition than that in which they were; and the injury was not the natural or proximate result of any act or omission of defendant. (*Cuff v. N. & N. Y. R. Co.*, 9 Am. Law Reg. (U. S.), 554; *Wilkinson v. Fairrie*, 1 Hur. & C., 633, 32 L. J. Ex., 73; *Kohn v. Lovett*, 44 Ga., 251; *Wharton on Negligence*, 828; *Lou. & Port. Canal Co. v. Murphy*, 9 Bush. 522; *Paducah, &c., R. Co. v. Hoehl*, 12 Bush, 41; *Hooper v. Snead Iron Co.*, 12 Ky. Law Rep., 488.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

A general demurrer to the petition having been sustained, the plaintiff in this case, who is an infant, suing by his next friend, has appealed.

The cause of action is stated substantially thus: That on the — day of August, 1890, one Stoker, who was foreman or superintendent of defendant Lutz, requested plaintiff Lackat to go to defendant's place of business and inform him that his, Stoker's, child was dead, and he would not come to work that day.



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Lackat, &c., v. Lutz.

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That while on his way to the building owned by defendant for the purpose of delivering said message, he, plaintiff, was directed to go into a small room where the person could be found who would convey said message to the defendant; that said room was very dark, and while he was attempting to make a step his leg was caught in an opening or hole that had been negligently left so, and a large revolving wheel crushed his leg; that he did not know of the danger to which he was exposed, and could not discover it on account of darkness of the room.

It is further stated that plaintiff had no notice or warning of the danger, but defendant, his agents or servants, negligently directed him into said room.

It is not alleged plaintiff, when injured, was in performance of any duty to defendant, or that he was at the place of defendant with his knowledge or consent. On the contrary a fair inference from statements of the petition is, that he went there at instance and for accommodation of only Stoker, who was, for that day at least, not in service of the defendant.

It is not alleged that the room in which plaintiff received the injury was designed or used as a passageway for strangers, or was ever, in fact, entered by any others than employes of defendant.

The defendant, therefore, owed to plaintiff no other duty or care than any other stranger or person intruding upon his premises without his consent or knowledge. And as the actual condition of the room in question was not a subject affecting the rights or interests of any other than defendant and his em-

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Lockett, &c., v. Lockett, &c

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ployes, we have the case of a plaintiff, not alleged to be deficient in intelligence, voluntarily going where he need not have gone, and the exercise of ordinary care would have kept him from going.

It is true, it is in general terms alleged, that plaintiff was directed by some one to go into that room where he could find a person who would convey the message to defendant. But even assuming the person who gave the direction was an employe of defendant, though it is not so alleged, still, if the room was too dark for him to see his way, he need not have gone, and ordinary prudence would have kept him from going there. Whether the person who gave the direction was or was not an employe of defendant, he alone, if any person, can be made liable for the injury, because he was not then acting in the line of his duty, or by the direct or implied authority of defendant.

Judgment affirmed.

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CASE 46—PETITION EQUITY—MAY 2.

Lockett, &c., v. Lockett, &c.

APPEAL FROM HENDERSON CIRCUIT COURT.

CONSTRUCTION OF DEVISE.—Under a devise of land by a testator to his daughter "and her lineage," the daughter takes a fee-simple estate, the word "lineage" being used in the sense of heirs.

MONTGOMERY MERRITT FOR APPELLEES.

Under the devise by the testator to his daughter and her "lineage," the daughter takes a fee-simple estate. (Johnson v. Johnson, 2 Met., Vol. 94—19.

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383; Breckinridge v. Denny, &c., 8 Bush, 527; 1 Washburn on Real Property, p. 97.)

WM. P. COOPER FOR APPELLEES.

The word "lineage" is used in the sense of children, and the children of the testator's daughter take a present interest with their mother. (Mitchell v. Simpson, 10 Ky. Law Rep., 709; Mefford v. Dougherty, 11 Ky. Law Rep., 158; Jarvis & Trabue v. Quigley, 10 B. M. 106; Prescott v. Prescott, 10 B. M., 58; Righter v. Forrester, 1 Bush, 282.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The question on this appeal is, whether Hebe Lockett, who, with her husband, brought this action to quiet her title against her children, acquired by will of her father, Milan Hancock, a fee-simple or less estate in the land in controversy.

That part of the will necessary to be quoted is as follows :

"I give to my wife, Hebe A. Hancock, my tract of land situated on Ohio river, to have for her benefit during life; also all the stock, farming utensils and furniture I may die possessed of. And I give to my wife and daughter, Susan C. Hancock, all the money and what may be owing to me at my death, to be equally divided between them. I also give to my daughter, Susan, my farm of two hundred and six acres, on which I reside. I give to my daughter, Hebe H. Lockett, *and her lineage*, two hundred and twenty-six acres, being a portion of the tract I purchased of Hart. I leave in trust to my friend and brother-in-law, H. W. Grigsby, for the benefit of my son, Milan Hancock, Jr., and his children, two hundred and thirty-six acres, being land I purchased of Hart. Said land, at the death of my son, Milan Hancock, Jr., I wish equally divided between his

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Lockett, &c., v. Lockett, &c.

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children, and in case of the death of any of his children, they leaving children, said children are to receive a father's or mother's interest. It is also my wish that said farm be cultivated annually, and that my friend and brother-in-law, H. W. Grigsby, shall see that the proceeds are judiciously appropriated for the support of my son, Milan, and his family, and in educating his children. I wish that at the death of my wife, Hebe A. Hancock, the farm that I have given her shall be sold, and the proceeds equally divided between my three children, Susan Hancock, Milan Hancock, Jr., and Hebe H. Lockett."

There is nothing in the language or context of the will even suggestive of an intention of the testator to give to his daughter, Hebe H. Lockett, less than a fee-simple estate in the two hundred and twenty-six acres of land mentioned, unless the term *lineage*, used in connection with the devise to her, be interpreted to restrict her interest to that of a life estate, remainder to her children, or to a joint tenancy with them. Lineage is not a legal term, but means, according to Webster's Dictionary, "race; progeny; descendants in a line from a common progenitor."

It seems to us plain that the term "lineage" was intended by the testator to be used and understood in the sense of heirs, and as simply a word of limitation. For if the testator had intended either for his daughter to have a mere life estate in the land, or that her children should take as joint tenants with her, he would have used the word "children," as was done in describing the estate he desired his son to have in the tract of two hundred and thirty-six acres,

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The Addyston Pipe and Steel Company v. Copple.

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and would have been as explicit and particular in providing for grand-children in case of death of any of her children, as he was in respect to those of his son.

It is true the devise of two hundred and six acres was made to his daughter, Susan Hancock, absolutely and without use of the term lineage or any other word of either limitation or purchase. But as Susan was then unmarried, the idea of children or heirs may not have occurred to the testator in respect to her. But be that as it may, there is no apparent reason for a devise by the testator of a less estate in the land to his daughter Hebe than that given to his daughter Susan. And it seems to us if the testator had intended to make such discrimination between his two daughters, he would have used additional language, or at least a term more apt, expressive and definite than the single word lineage.

The judgment of the lower court, according with our views, is, therefore, affirmed.

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CASE 47—PETITION ORDINARY—MAY 2.

The Addyston Pipe and Steel Company v.  
Copple.

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APPEAL FROM CAMPBELL CIRCUIT COURT.

**RECEIPT IN FULL SETTLEMENT FOR PERSONAL INJURIES—MISTAKE—BURDEN OF PROOF.**—Where the defendant in an action to recover damages for personal injuries relied for defense upon a writing signed by the plaintiff acknowledging the receipt of a certain sum from the

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defendant "in full settlement" of all claims against defendant on account of the injuries received, it was error to instruct the jury that the burden was on the defendant to show that the plaintiff fully understood and assented to the agreement as a settlement of his claim for damages. The presumption is conclusive that the plaintiff so understood the writing, and he is bound by it with that meaning unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence.

NELSON & DESHA FOR APPELLANT.

No brief filed.

C. J. HELM, CLEARY & CLEARY FOR APPELLEE.

Under the circumstances attending the settlement the burden was on the defendant to show that no advantage was taken of plaintiff in its procurement.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee brings this suit against the appellant to recover damages for the loss of a leg, caused by the gross neglect of the appellant in knowingly having defective machinery for the appellee to work with while in its employment, and of which defect the appellee did not know, and which defect caused the machinery to give way and broke the appellee's leg. The appellee recovered four thousand five hundred dollars damages for said injury. The appellant has appealed from that judgment.

The appellant traversed the allegation of defective machinery and negligence. It pleaded the further fact that appellee, before the institution of his suit, accepted one hundred dollars in money and an artificial leg in full satisfaction of said injury. The appellant relied on a written contract, which reads as follows:

“Received from Addyston Pipe and Steel Com-

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The Adkyston Pipe and Steel Company v. Copple.

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pany the sum of one hundred dollars, in full settlement of all claims of whatsoever kind or character, caused by, or in anywise growing out of, an accident to me, Henry Copple, on or about the 29th day of October, 1889, at pit No. 3, Newport Works, Newport, Ky.

"In testimony whereof, I have hereunto set my hand, this the 17th of February, 1890.

"HENRY COPPLE."

"We also agree to furnish said Henry Copple with a good and serviceable artificial limb."

The appellee admits the agreement, but says that the appellant procured it from him by fraud, &c. He does not allege mistake as to the contents of the writing. The court instructed the jury in instruction No. 4 that they must find for the appellant, if the appellee, at the time he signed the agreement, "understood and fully assented to the same as a settlement in full of his claim for damages herein." Instruction No. 7 informs the jury that "the burden is on the defendant to make out its case by a preponderance of proof of the said settlement with the plaintiff under the fourth instruction herein." The other instructions place the burden upon the appellee as to the allegations of fraud. The instructions, taken together, mean that the burden of proof was upon the appellant, to show that the appellee "understood and fully assented to the agreement as a settlement of claim" for damages, and that the burden was upon the appellee to show that the agreement was obtained by fraud.

The writing signed by the appellee means that the

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damages caused by the injury complained of were fully settled by the acceptance of one hundred dollars in money and the artificial limb. And the presumption is conclusive that the appellee thus understood it, and he is bound by the writing with that meaning, unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence. Therefore, the instruction throwing the burden upon the appellant to show that the appellee "understood and fully assented" to the writing is erroneous,

The judgment is reversed, and the case is remanded for a new trial.

There is no brief on file for the appellant.

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CASE 48—PETITION —MAY 2.

Preston, &c., v. Fidelity Trust and Safety  
Vault Co.

94	295
107	425

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APPEAL FROM LOUISVILLE CHANCERY COURT.

1. AN APPEAL LIES TO THE CIRCUIT COURT FROM AN ORDER OF THE COUNTY COURT REFUSING TO PROBATE A WILL whether for supposed want of jurisdiction or for other cause, the refusal to probate being a "rejection" of the will within the meaning of the statute giving an appeal. And upon the trial of the appeal in the circuit court, if that court determines that the county court has jurisdiction, it should hear the case upon its merits, and determine whether the will should have been probated, although the county court may have refused to probate the will upon the sole ground that it had no jurisdiction.

A county court having heard testimony as to the residence of a testatrix, and refused to probate her will upon the ground that it had no jurisdiction, and the propounders having appealed to the circuit court, this court refuses to grant a writ of prohibition to prevent the circuit court from entertaining the appeal, holding that the appeal



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lies. But the court does not decide the question as to its power to issue the writ if there had been no jurisdiction in the court below.

2. **MANDAMUS DOES NOT LIE TO COMPEL THE COUNTY COURT TO PROBATE A WILL** where that court has heard testimony as to the residence of the testator and determined that it had no jurisdiction, the remedy being by appeal to the circuit court.

**HUMPHREY & DAVIE FOR PETITIONERS.**

1. The statutes of Kentucky give an appeal from the county court to the circuit court in a "will case" only where the county court has "probated" or "rejected" the will. (Gen. Stat., chapter on "Wills," sections 26, 27, 35, 36; act April 23, 1873, Public Acts 1873, p. 60; Carroll's Code, p. 380; State v. Fowler, 108 Mo., 465; Walkerley's Estate, 94 California, 352.)
2. The overruling by the Jefferson County Court of a motion to probate a will, on the ground that the testatrix resided in another county, was not a "final order" or "final judgment," so as to be appealable. (Turner v. Browder, 18 Ben. Mon., 825; Glass v. Mercer, 89 Ky., 199; Cleaver v. McManus, 66 Texas, 48; Railroad v. Wiswall, 28 Wallace, 507; Benjamin v. DuBois, 118 U. S., 46; Livingston v. Dorgenois, 7 Cranch, 577.)
3. A judgment "rejecting" a will is a judgment which pronounces it a "nullity;" and a refusal of a county court (for want of jurisdiction) to consider the question of will or no will is not a "rejection." (Jacob v. Pulliam, 8 J. J. Mar., 200; Wells' Will, 5 Littell, 273; Tibbatts v. Berry, 10 B. Mon., 474; Henry v. Nunn, 11 B. Mon., 241; Stevenson v. Huddleson, 18 B. Mon., 311; Mitchell v. Holder, 8 Bush, 364; Abbott v. T aylor, 11 Bush, 335; Singleton's Will, 8 Ben. Mon., 358.)
4. The remedy of the propounders, if they still claim the residence to have been in Jefferson county, is to sue out a writ of mandamus in the circuit court against the county court, to compel the county court to proceed to try the will on its merits, and to "probate" or "reject" it; and on such a proceeding the question of the residence of the testatrix and the jurisdiction of the county court will be tried and settled in the circuit court. (Code, sec. 475; Regina v. Southampton County Court, Amer. Digest, 1802, p. 3249, sec. 24; Amer. and Eng. Ency. of Law, vol. 14, pp. 111, 119; *Ex parte* Parker, 131 U. S., 221; Elliott on Appellate Procedure, sec. 516; *Ex parte* Newman, 14 Wallace, 165; Harrington v. Holler, 111 U. S. 796; *Ex parte* Bradstreet, 7 Peters, 604; *Ex parte* Russell, 13 Wallace, 664; Ins. Co. v. Comstock, 16 Wall., 258; R. R. v. Wiswall, 28 Wall., 507; *Ex parte* Schollenberger, 96 U. S., 369; Knick. Ins. Co. v. Comstock, 16 Wall., 258; State v. Ellis, 41 La. Ann., 41; State v. Judges 42 La. Ann., 1087; *Ex parte* Bar Ass., 92 Ala., 113; State v. Hunter, 3 Washing-

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- ton R., 92, *State v. Murphy*, 19 Nev., 89; *State v. Laughlin*, 75 Mo., 358; *Beguhl v. Swan*, 39 Cal., 411; Merrill on Mandamus, sec. 203; *State v. Kansas City Court*, 97 Mo., 381.)
5. The remedy by mandamus to compel the county court to act is an established practice in Kentucky. (*Lowe v. Phelps*, 14 Bush, 645; *Board Pharmacy v. White*, 84 Ky., 632; *Hoke v. Com.*, 79 Ky., 568; *Clark v. McKinsley*, 7 Bush, 528; *Vance v. Field*, 89 Ky., 178; *Lou. Industrial School v. Louisville*, 88 Ky., 590.)
  6. The circuit court having no jurisdiction of the appeal from the county court, and its proposed action being a usurpation of jurisdiction, the Court of Appeals, under the new Constitution, should issue a writ of prohibition to prevent it. (Kentucky Constitution of 1891, sec 110.)
  7. The history of the adoption of this section 110 by the Kentucky Constitutional Convention, and debates thereon, will be found in Debates, Convention of 1890, pages 2996, 2999, 3002, 3127, 5197, 5584.
  8. This section of the Kentucky Constitution having been adopted from the constitutions of other States, the construction placed on those constitutions by the supreme courts of those States will be considered as adopted along with it. (Endlich on Interpretations of Statutes, secs. 550, 531, 371; *Daly v. Swope*, 47 Miss., 367; *McDonald v. Hovey*, 110 U. S., 628; *Sedgwick Constitutional Construction*, 229, note; *Overfield v. Sutton*, 1 Met. (Ky.), 621; *Lee v. Forman*, 3 Met. (Ky.), 114; *Johnson v. Offutt*, 4 Met. (Ky.), 19.)
  9. This provision, in substance, is in the constitutions of Alabama, South Carolina, Iowa, Colorado, Michigan, Missouri, North Carolina, Wisconsin, Virginia, West Virginia, Ohio, Pennsylvania, Kansas, California, Florida, Nevada, Texas, Louisiana, Utah, and had been construed in those States before adopted in Kentucky as authorizing the Court of Appeals to issue a writ of prohibition to prevent a circuit court from usurping jurisdiction. (Ben Perley Poore's Constitutions; Am. and Eng. Ency. of Law, vol. 19, pp. 266, 267, 268, 276, 279, 280; High on Extraordinary Remedies, secs. 765, 767, 776; *Perry v. Shepherd*, 78 N. Car., 33; *Ex parte Smith*, 23 Ala., 94; *State v. Judge*, 39 La. Annual, 97; *State v. Judge*, 4 Robinson (La.), 48; *State v. Judge*, 21 La. Ann., 113; *State v. Allen*, 45 Mo. App., 551; *State v. St. Louis Court*, 99 Mo., 216; *State v. Columbia*, 16 S. Car., 413; *Ex parte Hill*, 38 Ala., 452; *Henry v. Steele*, Judge, 28 Ark., 455; *Com. v. Latham*, Judge, 85 Va., 32; *Supervisors v. Correll*, 20 Grattan (Va.), 495, 522; *Russell v. Jackway*, 33 Ark., 191; *Swinburne v. Smith*, 15 W. Va., 483; *Ex parte Hamilton*, 51 Ala., 64; *Ex parte Green*, 29 Ala., 57; *Thomas v. Meade*, 36 Mo., 246; *Supervisors v. Wingfield*, 27 Grattan, 333; *County v. Boreman*, 34 W. Va., 87; *State v. McCrea*, Judge, 40 La. Ann., 20; *State v. Judges*, 40 La. Ann., 711; *Yearin v. Speirs*, 4 Utah, 482; *State v. Walls*, Judge,

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118 Mo., 42; Henshaw v. Cotton, 127 Mass., 60; Conn. R. R. v. County, 127 Mass., 58.)

10. The principles under which writs of prohibition are issued are fully recognized in Kentucky, and should now be made applicable under this new constitutional provision. (Reese v. Lawless, 4 Bibb, 394; Arnold v. Shields, 5 Dana, 18; Sasseen v. Hammond, 18 Ben Mon., 672; Bank Lick Co. v. Phelps, 81 Ky., 613; Pennington v. Woolfolk, 79 Ky., 21.)
11. The fact that an appeal would ultimately lie from whatever illegal final judgment may be hereafter rendered by the lower court in pursuance of its usurped jurisdiction does not furnish a timely, speedy or adequate remedy, and does not prevent the writ of prohibition from issuing. (Yearin v. Speirs, 4 Utah, 482; State v. Allen, 45 Mo. App., 571; Supervisors v. Gorrell, 20 Crattan, 522; Russell v. Jackway, 83 Ark., 191; Swinburne v. Smith, 15 W. Va., 483; Thomas v. Meade, 85 Mo., 246; County Court v. Boreman, 11 Southeastern, 717 (34 W. Va.); State v. McCrear, 40 La. Ann., 20; Henshaw v. Colton, 127 Mass., 59.)

WM. LINDSAY OF COUNSEL ON SAME SIDE.

BARNETT, MILLER & BARNETT FOR RESPONDENT.

1. The last sentence of section 110 of the Constitution is merely declaratory of what the law was before, and does not give this court power to issue a writ of prohibition to a court of inferior jurisdiction except in aid of its appellate jurisdiction. (Vance v. Field, 89 Ky., 178.)
2. If it be conceded that the last sentence in section 110 confers upon this court any new power, it is not self-operative.
3. Section 479 of the Civil Code excludes the jurisdiction of this court, for by that section the writ must issue by an order of some circuit court to an inferior court of limited jurisdiction.
4. Neither a writ of prohibition or mandamus will ever go where the party can rectify the error committed against him by appeal or a writ of error. (Elliott on Appellate Procedure, secs. 514, 518.)
5. The Jefferson Court of Common Pleas has general jurisdiction in matters affecting the probate or non-probate of wills, and jurisdiction will be presumed until drawn in question and the facts heard. (Jacobs v. L. & N. R. Co., 10 Bush, 268.)
6. The statute confers the right of appeal to the circuit court wherever the probate of a will is granted or denied without any sort of regard to the grounds for the judgment of the court. (Gen. Stats., chap. 113, sec. 27.)

BYRON BACON AND ERNEST MACPHERSON ON SAME SIDE.

1. The last sentence of section 110 of the Constitution is but a constitutional recognition of the power of this court to issue appropriate

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writes when there is *no other* specific remedy. (*Vance v. Field*, 89 Ky., 179.)

But conceding that the provision of the Constitution relied on was intended to extend the jurisdiction of this court, there is no legislation defining or providing for the exercise of this newly conferred power, and if it is self-operative, then it means the common law writ of prohibition with its common law character and the common law procedure. (*High's Extraordinary Remedies*, sec. 781.)

2. As to the nature and office of the writ, see *High's Ext. Remedies*, sec. 762; 19 Am. & Eng. Enc. of Law, 268, and authorities cited; *Idem*, 271.

To authorize the writ, there must be a total absence of all other remedies (*Sasseen v. Hammond*, 18 B. M., 678; *Commissioners v. Spitler*, 18 Ind., 235; *Ex parte Smith*, 84 Ala.; *State v. Commissioners of Roads*, 12 Am. Dec., 60<sup>2</sup>, note.)

3. An appeal lies from an order of the county court refusing to probate a will without regard to the ground of the refusal. (*Gen. Stats.*, chap. 113, sec. 27.)

The reason given by the court to sustain its decision is no part of the judgment. (12 Am. & Eng. Enc. of Law, 59, 60.)

Statutes giving the right to appeal are liberally construed in furtherance of justice. (*Houk v. Barthold*, 78 Ind., 21; *Pearson v. Lovejoy*, 53 Barb., 407; *Cally v. Anson*, 4 Wis., 228; *Russell v. Wheeler Hempstead* (Ark.), p. 4; *State v. Manning*, 14 Texas, 402.)

4. The question of domicile, when a party is shown to have been resident of two places, and to have exercised acts of habitation in both, is a mixed question of law and fact. (*Cochrane v. Boston*, 4 Allen (Mass.), 178; *Lyman v. Fiske*, 17 Pick (Mass.), 298; *Fitchburg v. Wichendon*, 4 Cush. (Mass.), 190.)

5. Mandamus does not lie to compel the county judge to probate the will. (*Merrill on Mandamus*, sec. 82; *Goheen v. Myers*, 18 B. M., 426; *Bacon Abr.*, Mandamus, 436; *Black. Comm.*, 110; 2 *Strange*, 881; 19 *John*, 260.)

P. B. MUIR OF COUNSEL ON SAME SIDE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Mrs. Mary Howard Preston departed this life on the 17th of November of the year 1892, leaving a paper purporting to be her last will and testament that was offered for probate in the Jefferson County Court, and by one of its provisions the Fidelity Trust

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Preston, &c., v. Fidelity Trust and Safety Vault Co.

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and Safety Vault Company was made the sole executor.

The contestants, who were the heirs at law of Mrs. Preston, resisted the probate of the will on three grounds—first, because the decedent, at the time of her death, resided in the county of Trimble; second, she was of unsound mind at the time she executed the instrument; and lastly, that it was procured by undue influence.

The case was heard by the Judge of the Jefferson County Court on December 30, 1892, upon evidence touching all the points at issue, viz: residence, mental capacity and undue influence, and this judgment entered: "It is the judgment of the court that the legal residence of Mary Howard Preston at the time of her death was in Trimble county, Kentucky, and for that reason this court has no jurisdiction to probate the will, and the said motion is overruled."

After this judgment was entered the propounders of the paper took an appeal to the Jefferson Court of Common Pleas, and after the case reached that court the contestants, for the purpose of questioning the jurisdiction of the court, moved to dismiss the appeal for want of jurisdiction on the part of that tribunal to determine the question, insisting that the remedy for the propounders was not by an appeal, but to apply to a court of superior jurisdiction to compel the county court, by mandamus, to dispose of the case on its merits. The common pleas court having the jurisdiction of appeals in will cases, overruled the motion to dismiss the appeal taken by the propounders, and the contestants, claiming that this

action on the part of the judge of the court of common pleas was a usurpation of jurisdiction, filed the present petition in this the appellate court, asking for a writ of prohibition commanding the judge of the court of common pleas to cease entertaining jurisdiction on the appeal.

The right of the contestants to this writ, and the exercise of such a supervening power by this court, is claimed to be derived from section 110 of the new Constitution, that provides: "Said court (the Court of Appeals) shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

As the court below has, in our opinion, jurisdiction of the appeal, it is unnecessary to determine the power of this court to grant the writ. We will proceed, therefore, to discuss only the right of the propounders to an appeal.

The statute gives to the circuit courts (common pleas courts having like jurisdiction) jurisdiction of appeals from every judgment of a county court admitting a will to record or rejecting it. (General Statutes, section 27, chapter 113, title Wills.)

It is not claimed that this will has been rejected on the merits, or that the judgment of the county court rejecting it for want of jurisdiction would be a bar to a like proceeding in the Trimble County Court, but it is contended the probate has been denied, and this gives the right to an appeal; and if so, the remedy being ample, it affords a strong reason for refusing the writ.

The language of the statute, in regard to appeals

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in will cases, does not require, before an appeal can be taken, that a judgment should first be rendered invalidating the paper. It is enough that the court to which the application is made refuses to probate the writing, whether for the one cause or the other the will has been rejected, and the right to an appeal exists. The word reject means, as defined by Mr. Webster, "to throw away ; to discard ; to refuse to receive ;" "to refuse to grant, as to reject a prayer or request." To give the word reject the technical meaning contended for by counsel for the contestants, would be to deny the propounders a remedy when the offer of probate is denied, and the jurisdiction of the county court, so far as its decision goes, ended. If application to probate should be made to the Trimble County Court, with a decision adverse to the jurisdiction, the propounders would be without remedy. When the case reaches the circuit court the judge hears the testimony on the question of jurisdiction and determines it, and if his judgment should be adverse to that of the county court, the case will then be tried on its merits, and whether at the same term is for that court, and not this, to determine. If the decision of the judge ends with that of the county court as to the jurisdiction, the propounders on that issue alone can appeal to this court, and if the case is heard on the merits either party can also raise the question should it come to this. There is no reason why the case should not be tried as other cases on appeal, the court first determining its jurisdiction. The case was before the county court for judgment, and if that judgment is final as to that court, there

is no reason for withholding from the circuit court the power to try the entire case, if, in his opinion, the county court had jurisdiction to probate the paper.

It is, however, argued that the judgment upon the question of jurisdiction was not a *final judgment*, or one from which an appeal could be taken, and the case of Benjamin's Heirs v. DuBois, reported in 118 U. S., 46, is referred to as sustaining this view. It is said in that case, that a judgment or decree to be final, so as to give the court jurisdiction on appeals or writs of error from the Supreme Court of the District of Columbia, must be on its merits. That case has no application to the practice in this State, as appeals may be granted from orders of dismissal for want of jurisdiction, or for any other cause where the amount in controversy is within the jurisdiction of the appellate court.

The statute provides that the appeal in will cases shall be in five years after the judgment of probate or rejection, and this would apply, in so far as the appeal is concerned, to the judgment refusing to probate for want of jurisdiction, and while the limitation applies to the appeal, it would not affect the right to probate in the court having the jurisdiction, as a judgment without jurisdiction is a nullity.

We must deny the request made for the writ.



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## CASE 47—PETITION EQUITY—MAY 4.

## Trimble's Ex'r v. Lebus, &amp;c.

## APPEAL FROM HARRISON CHANCERY COURT.

1. **POWER OF EXECUTOR TO SELL STOCKS AND BONDS.**—The act of April 29, 1890, which provides that "no administrator or executor shall sell any dividend-paying stocks, bonds or other property which the decedent owned at his death until so ordered by a court of general equity jurisdiction in the county where letters of administration were granted or will recorded," does not apply where a testator has by his will invested his executor with discretionary power to make such sales. And while an executor may be enjoined from abusing such a discretion where it is affirmatively alleged and shown he is about to do so to the prejudice of other beneficiaries of the will, no such state of case is shown here.
2. **TRANSITORY ACTION.**—Whether the remedy sought by the executrix here be for direct recovery of the purchase price of bank stock sold by her under a discretionary power conferred by the will, or for specific performance of the contract of sale, the action is transitory and not local.

**O'HARA & BRYAN FOR APPELLANT.**

The will, made and probated long before the act of April 29, 1890, was passed, vested appellant as executrix with full power, at her own discretion, to sell the stock and invest the proceeds, and she could not be deprived of that vested right, or controlled, by the act in question, or any act passed by the Legislature after that right vested in her.

**J. IRVINE BLANTON FOR APPELLEES.**

The Kenton Chancery Court is the only court of competent jurisdiction to decree a sale of this stock, or to confirm a sale already made by the executrix. (Act of April 29, 1890, Acts 1889-1890, vol. 1, p. 116.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT**

Mary A. Trimble, executrix of the will of her husband, W. W. Trimble, who died in Kenton county, where said will was recorded, brought this action in the Harrison Circuit Court to recover of Lewis Lebus five thousand five hundred dollars, price of

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Trimble's Ex'r v. Lebus, &c.

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fifty shares of stock of the Farmers' National Bank of Cynthiana, Kentucky, belonging to the estate of her deceased husband, that she alleges she had previously sold to the defendant.

It is stated in the petition the plaintiff tendered to defendant certificates of the stock in writing thereon assigned to him, but that the officers of said bank declining to make a transfer of the stock on its books, defendant refused to pay the price he had agreed to give for the stock or to accept the certificates thereof. Subsequently plaintiff filed an amended petition, making the devisees of W. W. Trimble and the Farmers' National Bank of Cynthiana parties-defendant, and asking a specific performance of her contract with Lebus, and, to carry it out, that the bank be required to make the necessary transfer on its books.

Upon transfer of the action to the Harrison Chancery Court, a special demurrer to jurisdiction of the court was filed by guardian of infant devisees of the testator, W. W. Trimble, and also by the Farmers' National Bank of Cynthiana. And this is an appeal from the judgment sustaining the demurrer and dismissing the action. Clause 5 of the will of W. W. Trimble, after reciting the various banks, stock of which he owned, including one hundred shares of the Farmers' Bank of Cynthiana, proceeds as follows: "My wife, Mary B. Trimble, I give the interest that may accrue on said bank stocks after my death as long as she lives, to do as she may please with."

Clause thirteen of the will is as follows: "I appoint my wife, Mary B. Trimble, executrix of this, my will, and request that no security be required of

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her by the county court. If necessary to change the bank stocks, or any or either, from any cause now unforeseen that may arise, she is authorized to do so."

It seems to us appellant was, by the will, invested with discretionary power to sell the stock of Farmers' National Bank of Cynthiana, or of any other of those enumerated in clause 5 of the will; and in view of the fact alleged in her petition that bank had for two years or more prior to the sale to Lebus, failed to pay dividends, as it was accustomed to do before and for some time after death of the testator, it was the right of appellant, and manifestly intended by the testator, the stock in question should be sold, and the proceeds invested in other stocks paying dividends; and as the action is transitory and not local, whether the remedy sought be for direct recovery of the purchase price, or for specific performance of the contract of sale, we are also satisfied the Harrison circuit and also the chancery court to which the action was transferred, had jurisdiction, and it was error to sustain the special demurrer.

It is, however, argued by counsel, and we suppose was assumed by the chancellor, that provisions of "An act prescribing duties of fiduciaries," approved April 29, 1890, operated not only to deprive appellant of the discretionary power to sell the stock, but to restrict jurisdiction to enforce a contract of sale to the chancery court of Kenton county where the will of the testator was probated and appellant was qualified as executrix. That part of said statute applicable to sale of stocks, bonds and other securities by a personal representative is as follows:

“That no administrator or executor shall sell any dividend paying stocks, bonds or other property which the decedent owned at his death, until so ordered by a court of general equity jurisdiction in the county where letters of administration were granted or will recorded.” That statute was, we think, intended to apply to and control exercise by an administrator or executor of their general authority to sell and dispose of stocks and bonds paying dividends, but not to take from a testator the power to invest his executor with discretionary power to make such sales, nor to restrict the executor in the exercise of such power. Of course, in such case as this, an executor, though invested by the will with discretion to sell stocks and bonds left by the testator, may be, independent of said statute, enjoined from an abuse of such discretion, when it is affirmatively alleged and shown he has or is about to do so to the prejudice of other beneficiaries of the will. But no such state of case is set up or shown in this case, as might or may be done upon return of the cause, in the answer filed by such beneficiaries.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

## Pile v. Pile.

CASE 50—PETITION EQUITY—MAY 4.

## Pile v. Pile.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

DIVORCE.—The insanity of the wife does not entitle the husband to a divorce.

MORRIS ESKRIDGE FOR APPELLANT.

The plaintiff is entitled to a divorce upon any one of three grounds: Such impotency of the wife as prevents sexual intercourse; living apart without cohabitation for five years; contracting a loathsome disease after marriage.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant filed his petition in equity seeking a divorce from his wife on the ground of lunacy and an abandonment for five years, alleging that she is now confined in the lunatic asylum at Hopkinsville. He offers to surrender to the chancellor for the wife, such part of his estate, real and personal, as may be deemed necessary for her support and maintenance, but wants an absolute divorce.

It is stated in his petition that after their marriage they lived happily together for several years, when an unfortunate condition of her mind developed, and she is now and was at the institution of the action a confirmed lunatic, with no hope of recovery.

The causes for a divorce are to be found in the statute only, and lunacy is not, by express words or by any reasonable implication, made one of the grounds for severing the marital relation. It is argued that this mental disease is such as to prevent the wife from discharging her conjugal duties, and

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the husband from enjoying that intercourse with the wife resulting from the marriage relation. We can not give such an enlarged meaning to the statute. Here the wife has a mind diseased without her fault. She lived happily with her husband for several years after marriage, and discharged all the obligations and duties pertaining to the marriage relation.

This relation is presumed to have been entered into by reason of the love and affection the two had for each other, and to adjudge that the misfortunes of this life, originating from causes over which neither has control, depriving the husband of the right of enjoying his baser passions, is a ground for divorce, would be placing mankind on a level with brute creation, and making the real virtues and happiness of married life subordinate to the enjoyment of mere animal propensities. This man, when he took the unfortunate woman to be his wife, vowed at the altar to love, cherish and protect her in sickness and in health, and whether the wife is diseased in mind or body, his marriage vow should and must be observed. The more helpless she becomes, the greater his duty to love and protect her. The wife has never abandoned the husband, but is now confined in the asylum for lunatics by his consent and direction. The chancellor did right in dismissing his petition.

Judgment affirmed.

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Louisville and Nashville Railroad Company v. Quinn, &c.

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## CASE 51—PETITION EQUITY—MAY 4.

Louisville and Nashville Railroad Company v.  
Quinn, &c.

Louisville and Nashville Railroad Company v.  
Wallace.

Louisville and Nashville Railroad Company v.  
Welch.

**MERE NON-USER IS NOT AN ABANDONMENT OF AN EASEMENT** created by deed; but if there is an actual adverse user by the owner of the servient estate for fifteen years, the easement is extinguished.

Land condemned for railroad purposes was surveyed and the report of survey accepted by both parties, the railroad company taking possession of only so much land as was designated by the report of survey as that condemned. After fifteen years the company seeks to recover an additional strip of land, which it claims was included by the judgment in the condemnation proceeding, but, by mistake, omitted by the surveyor. *Held*—That the possession of the owner of the servient estate was adverse, and that the railroad company's right is barred.

**HELM & BRUCE FOR APPELLANT.**

Under section 1 of art. 5, chap. 71, General Statutes, the possession was amicable so long as the city held the property.

The city did not acquire the fee-simple title, but acquired only a public easement in the land condemned. (*Kelly v. Donahoe*, 2 Met., 482; *Washington Cemetery v. Prospect Park, &c., R. Co.*, 68 N. Y., 598; *Clark v. Worcester*, 125 Mass., 280.)

But whatever may be the character of title acquired by the city in the condemnation proceeding, whether it be a title to the fee-simple in the land or only the title to an easement in the land, sec. 1 of art. 5, chap. 71, Gen. Stats., applies.

In construing a statute, the end sought to be accomplished, and the reason and spirit of the law will be considered. (*Mason v. Rogers*, 4 Litt., 377; *Sams v. San* s. 85 Ky., 400; *Bailey v. Commonwealth*, 11 Bush, 691; *Phillips v. Pope*, 10 B. M., 71.)

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Louisville and Nashville Railroad Company v. Quinn, &c.

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MATT O'DOHERTY FOR APPELLEES.

The fifteen years statute furnishes a complete bar to the action. The statute applies as well in actions for *easements*, &c., as in other controversies about real property. (Ray v. Sweeney, 14 Bush, 1; Anderson v. Sterrett, 79 Ky., 499.)

Section 1 of art. 5, chap. 71, Gen. Stats., has no application.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

As the issues in these cases are similar, they will be heard together and disposed of by one opinion.

Prior to 1872, the Louisville, Cincinnati and Lexington Railroad Company's depot was on Jefferson street. In 1872, the city of Louisville agreed with the Louisville, Cincinnati and Lexington Railroad Company that it would give said company a right of way along the old bed of Beargrass creek, and grade it and fit it for use in consideration of said company surrendering to the city its right of way on Jefferson street. The city, pursuant to this agreement, by condemnation proceedings, condemned the right of way along Beargrass creek. The jury that tried the condemnation proceeding did not specify the number of feet condemned, but condemned the land "described in the petition and included the lines designating the extension of the railroad tracks." The verdict was accepted and recorded as thus returned, and judgment was rendered condemning the lands in the same terms. The land was surveyed by the city engineer, the lines were established and stakes set designating the lines, and the owners, the appellees, were shown the lines and stakes, as the lines of the right of way thus condemned. The en-



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gineer returned to the court his survey, which was accepted, and the appellees accepted the survey as correct, and built their fences, and one of them a house on the line thus established by the engineer. Said fences have remained on the said line ever since, and the appellees have held the actual adverse possession of said land up to said line and fences ever since, a period of more than twenty years; and the appellant, the vendee of the Louisville, Cincinnati and Lexington Railroad Company, as did its vendors, has held the land surveyed by said engineer ever since, and claiming no more as its right of way until within the last few years when it brought these suits. It contends by these suits that the appellee had obstructed its right of way by building fences, and the corner of a house about two feet on its right of way. But, as said, the evidence authorized the chancellor's opinion that the fences, &c., were built on the line made by the engineer, and that they have remained on said line ever since. But it may be, and it is probably true, that the engineer did not include land enough in the survey by the quantity now claimed. Therefore, the question is, does the acquiescence of the appellant and its predecessors in said survey, and the adverse holding of the land up to said line by the appellees for fifteen years and more, bar the appellant's right to it and vest the appellees with the appellant's title? It will be borne in mind that the appellant, or those under whom it claims the easement or dominant estate, never had the strip of land in controversy in possession, either actual or constructive; nor did it ever claim a right of easement.

therein until the present controversy arose, more than fifteen years after the condemnation proceeding.

But the appellees all the time held the adverse possession of the strip, and claimed it as their own, and as not included in the land condemned, all of which the appellant, and those under whom it claims, conceded until this controversy. Now the appellees' land was sold by the judgment of a court; they were vendors *in invitum*. The court took so much land by metes and bounds, and said to the appellees, this is the specified boundary of land that is taken from you; the balance of the tract up to this line is not taken; it is yours. The appellees accept the survey, and hold the adverse possession of the land up to the line thus fixed for more than fifteen years, claiming it as their own, and the court's vendees all the time concede the right. It seems that the error could only be corrected under the idea of mistake in the survey, and the time allowed for that has long since passed, and adverse possession for fifteen years has barred the appellant's right. It is well settled that the right to the dominant estate—the easement—may be extinguished by the renunciation of the party, either expressed or implied, as by permitting the owner of the servient estate to take the actual adverse possession of it, to build on it, and to use it in other respects as his own for fifteen years. While mere non-user will not be an abandonment of the easement, if it is created by deed, yet if the owner of the servient estate is permitted to hold the adverse possession of it fifteen years, the dominant interest will be extinguished. (See *Taylor v. Hampton*, 4 McCord, 96, and other

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cases cited in note 2, 6 Am. & Eng. Enc. of Law, page 147, and Jewett v. Jewett, 16 Barb. (N. Y.), 150, cited in the same note on page 148.)

As said, admitting that there was a mistake in making the survey, nevertheless the time has passed for correcting the mistake, and the appellees have been permitted to hold the adverse possession of the land for fifteen years and more, claiming it as their own, and the appellant all that time conceding their claim of right. It, therefore, seems to us that their claim ought to prevail.

The judgment is affirmed.

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CASE 52—PETITION EQUITY—MAY 6.

## Horsley v. Asher's Heirs.

## APPEAL FROM CLAY CIRCUIT COURT.

1. AN ORDER TO REVIVE AN ACTION in the name of a representative or successor of a plaintiff may be made at any time within one year from the term of court at which the order might first have been made, as the limitation of one year prescribed by section 509 of the Civil Code was intended to run only from that time, and not from the time of plaintiff's death.
2. CONTRACT PROCURED BY FRAUD.—A contract by which the owner of a large body of land, valuable chiefly for its minerals and timber, granted the right to take minerals and timber from the land in consideration of the payment of twenty-five cents an acre, when the right was worth from six to ten times that amount, was properly set aside by the chancellor, the vendor being an old man who, by reason of disease, was not qualified to transact business, and who did not understand the true meaning and effect of the bond he signed.

## HELM &amp; BRUCE AND S. B. DISHMAN FOR APPELLANT.

1. The plaintiff's sole ground for relief is fraud, and the burden of proof is upon him to establish that fact, which he has failed to do. The

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evidence as to the value of the land and of the mineral rights, relates to the time the testimony was given, and not to the time of the contract, and is, therefore, irrelevant.

2. The order of revivor was not made in time. It should have been made within one year of the death of the plaintiff, and not being made within that time, the action should have been stricken from the docket. (Civil Code, secs. 509, 510; *Hull v. Deatly*, 7 Bush, 691.)

**WM. LINDSAY AND EDWARD W. HINES FOR APPELLEES.**

1. By the filing of the amended petition, and the service of summons thereon, the action stood revived in the names of the persons calling themselves executors without an order to that effect. (Civil Code, sec., 509, and amendment; *Greer v. Powell*, 1 Bush, 496.)
2. Even if the consideration had been adequate, the chancellor would have been justified in setting aside the contract; but when the total inadequacy of consideration is added to the feeble mental and physical condition of the vendor, there can be no doubt of the correctness of the judgment. (*Woollums v. Hersley*, 98 Ky.)  
Gross inadequacy of price is always a badge of fraud. (*Hunter v. Owens*, 10 Ky. Law Repr, 652.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

J. D. Asher brought this action December 10, 1887, to cancel the following writing signed by him and rescind the contract it purports to be evidence of: "Know all men by these presents, that for and in consideration of ten dollars in hand, paid to-day, June 13, 1887, I have sold to W. J. Horsley, all the coal, gas, oils or minerals, with customary mining privileges, in or on the tract of land situated on the waters of Redbird, Clay county, Kentucky, adjoining the lands of R. W. Asher and others, containing three thousand acres, more or less, at twenty-five cents per acre, and I bind myself and heirs to make a good warranty deed for said coal, gas, oils and minerals free from dower, lien and all incumbrances to the said W. J. Horsley or his assigns, when money is paid as follows, to wit: One-half within six months

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after above date; balance within six months from first deferred payment, or as soon thereafter as good warranty deed is made to W. J. Horsley or his assigns for said coals, gas, oils and minerals, with necessary timber for mining and coking purposes."

In August, 1888, while the action was pending, the plaintiff died testate, and a question is made, which we will first consider, whether the action was revived within the period prescribed by Civil Code. October 10, 1888, an order was made suggesting death of plaintiff, J. D. Asher, though it does not appear upon whose motion the order was made, nor was the name or capacity of the representative stated therein, as required by section 501.

March 25, 1889, Thos. J., D. D. and A. J. Asher, mentioned as executors of J. D. Asher, though only the first mentioned of them ever did qualify, filed a petition for revivor and prosecution of the action in their names; but summons thereon, though issued, was never served on the defendant, nor does the subsequent order of revivor appear to have been made in pursuance of that proceeding.

But September 9, 1889, a petition, made an amendment to the original petition of the testator, was filed by his widow and devisees of his will, in which they asked the action revived in their names and for the relief prayed for by him. Summons was issued, and two days after served on the defendant. October 11, 1889, the defendant filed an answer to that amended petition, in which it was alleged the time had expired in which an order of revivor could be made. Nevertheless, the court sustained a demurrer to the answer, and on that day made an order of revivor.

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Section 509 provides that "an order to revive an action in the name of a representative or successor of a plaintiff may be made *forthwith*, but shall not be made without the consent of the defendant after expiration of one year from the time the order might have been first made."

As an order of revivor can be made only during a term of court, it is obvious the word "*forthwith*" relates thereto, and limitation of one year was intended under this section to then begin running and not to run from time of the plaintiff's death. In this case the widow and devisees, as they were expressly authorized by section 501 to do, filed their petition before expiration of one year from the October term, 1888, of the court having jurisdiction of the action, when the order of revivor "might have been first made," and thereby, according to both letter and reason of the statute, acquired a standing in court and became entitled to an order of revivor, which was, on the day referred to, legally and properly made.

There is no room for dispute about the facts of this case, nor any reason for hesitation about the judgment a court of equity should render.

1. The person with whom J. D. Asher made the contract was authorized as agent of defendant Horsley to purchase lands containing, or supposed to contain, gas, oil or minerals, and lying within twenty miles of a railroad, to the amount of twenty thousand acres; and the title bond executed by J. D. Asher was already written according to a form adroitly and cunningly prepared; and after the trade was agreed to, all necessary to be done was to fill

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the blank with quantity of his land and for him to sign his name.

What was sold by J. D. Asher was, according to unvarying testimony of witnesses, at a grossly inadequate price, and the bargain can not be regarded any other way than unconscionable. The land seems to be valuable only for timber and minerals, gas and oil it contains, and some of the witnesses go so far as to say that the minerals being separated from it, and timber taken or used to the extent and in the way that may be done under the contract in question, the land will be of no value.

They fix the value of the land for minerals, oil and gas, and timber incidentally used for development of it, at from six to ten times more per acre than by the terms of the bond Horsley is required to pay, which is twenty-five cents per acre; and even the agent who made the contract with Asher testifies as a witness what he purchased for that price per acre was worth one dollar and fifty cents per acre, and that the commission Horsley agreed to pay him was greater than the purchase price the bond bound the purchaser to pay.

We think it is also clear that J. D. Asher did not, nor was able to, comprehend the nature, import and effect of the contract he made, and was, in fact, overreached and defrauded by Horsley acting through his agent. Asher was, at the date of that bond, upwards of seventy years of age. He had been diseased and suffered physical pain for several years to such an extent that he had not attempted, nor was qualified, to properly transact business, all of it having been

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done during a period of five or six years by his wife or sons. The witnesses also testify, without contradiction, that he, though originally a man of good sense and business capacity, had become, at date of the bond, childish and notionate. In fact, he closed the contract and signed the bond at the agent's house, where he had gone for another purpose, without taking any time for reflection or consultation, and was in a few hours eager, and offered, to rescind, but the agent refused to do so.

It is further evident Asher did not understand the true meaning and effect of the bond he signed, and which he was unable to read, for by the latter clause of it, which he states was not read to him at all, Horsley was given right to enter upon the land not merely to dig for, find and use coal, gas and minerals of every kind, but to erect thereon all the buildings, machinery and appliances for coking purposes, which necessarily involved use of timber, without regard to quantity or quality.

In our opinion, the contract was not one fit to be enforced in a court of equity, but was made to such disadvantage of J. D. Asher as to induce belief, which the evidence makes a conviction, he was, by reason of want of capacity to understand the meaning and effect thereof, overreached and defrauded.

The judgment of the lower court is affirmed.



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Davis, &c., v. Jones' Adm'r.

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CASE 58—PETITION EQUITY—MAY 6.

## Davis, &amp;c., v. Jones' Adm'r.

APPEAL FROM KNOX COURT OF COMMON PLEAS.

AN AGREEMENT BY ONE PERSON TO MAKE ANOTHER HIS HEIR is not enforceable, and no action lies for its breach. The statute points out the only way in which one person can make another his heir.

WM. H. HOLT, A. K. COOK FOR APPELLANT.

Where one induces a mother to part with the custody, company and service of her child, upon a promise that the child shall have his property, his estate is liable for the non-performance of the contract, and the child may sue in his own name, although the undertaking was not directly to or with him. (1 Parsons on Contracts, p. 390; Civil Code, sec. 18; Allen v. Thomas, 3 Met., 198; Smith v. Smith, 5 Bush, 625; Clarke v. McFarland's Executors, 5 Dana, 45.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellants allege in their petition that George Jones agreed with the mother of the appellant, Marinda Davis, that in consideration of the mother surrendering the custody, care and control of Marinda, then an infant, to him, "he would clothe, support and educate her, and make her his heir at law, so that she could inherit all his estate." The appellants say that said Jones died without making Marinda his heir at law. They claim five thousand dollars damage for such failure. The court sustained a demurrer to the petition and the appellants have appealed. Was the agreement to make appellant Marinda the heir of George Jones binding upon him? Such agreements are against the policy of the common law; hence unauthorized, because heirship is controlled

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by the law of descents, having for its basis the degrees in blood, &c. And such agreements as that sued on in this case would put the estate in a different channel from that fixed by the law of descents.

Such contracts being unauthorized by the common law, and as all common contracts in this State are generally either authorized by the common law or by statute, no contract in general is binding unless it is authorized by the common law or by statute; and as the same reason exists in this State for forbidding such contracts as exists at common law, they are unauthorized and not binding. But the Legislature of this State has seen proper to authorize certain parties to make persons not related to them their legal heirs upon certain conditions, by petition to the county court having jurisdiction. And it has been settled by this court that the authority thus given is the only authority existing in this State, by which one person can make another his legal heir, and any agreement by one person to make another his legal heir, not in accordance with said statute, is not enforceable (see *Willoughby, &c., v. Motley*, 83 Ky., 300; *Power v. Hafley*, 85 Ky., 671); and no action will lie for its breach. In the case of *Allen v. Thomas*, 3 Met., 198, the father of a bastard child agreed with its mother, she being about to sue him, to contribute to the support of the mother and child, and pay to the child ten thousand dollars when requested. It was held that the agreement was binding, because it was based upon a compromise and adjustment of a claim that the mother had a right to make in behalf of herself and child. There is no

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principle of public policy or of statute forbidding a compromise of such claim.

In this case, the agreement not being in accordance with the statute, *supra*, is not enforceable, and no action will lie for its breach.

The judgment is affirmed.

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CASE 54—INDICTMENT—MAY 6.

## Hall v. Commonwealth.

## APPEAL FROM PIKE CIRCUIT COURT.

1. **THE ELECTION OF CIRCUIT JUDGES** on the first Tuesday after the first Monday in November, 1892, was valid, whether or not the act of the Legislature regulating the election of judges at that time was passed in accordance with the provisions of the Constitution. And as the provision of the Constitution directing the election to be held at that time is imperative, it was not necessary that there should be an emergency clause to the act of the Legislature regulating the election.
2. **SELF-DEFENSE.**—The rule that where one is assaulted in his own castle with a deadly weapon he is not compelled to flee, or to resort to such means of escape as may be apparent, but may stand and defend himself, had no application in this case, as the accused was assaulted in his store, to which persons were invited, and where the deceased, therefore, had a right to be. And, besides, the accused was not assaulted with a deadly weapon.

J. B. AUXIER FOR APPELLANT.

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

Record and briefs misplaced.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

At the March term of the Pike Circuit Court for the year 1893, Henry Hall, the appellant, was indicted for the murder of his brother, Randolph Hall, and

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the jury who tried the case fixed the punishment at death.

We have seldom read a record of conviction where there were less palliating circumstances in behalf of the accused than this case presents. He filed an affidavit for a continuance on the ground that his brother had threatened to take his life, and had, on more than one occasion, assaulted him—facts that could be established by the absent witnesses who had been summoned. The court refused the continuance and allowed the statements contained in the affidavit as to what these absent witnesses would state, to go to the jury as evidence. On the trial he established, by a number of witnesses who were before the jury, that these threats had been made, as well as the assault upon him, by his deceased brother, with a knife, some time prior to the killing. There can be no doubt that both the brothers, when under the influence of liquor, were violent and bad men, and that when their passions were inflamed by liquor, they respected the rights or feelings of no one, not even their parents, and this murder was the result of a drunken debauch when in a game of cards the one brother had won the money of the other.

There was no one present when the murder took place but the little daughter of the deceased, of the age of twelve years, and a brother of the two men, who were ready to kill each other at any time when drunk, and that brother was so stupefied with whisky as not to be able to give any account of the shooting, except that the shooting aroused him from his stupor, and he saw one brother standing with his

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pistol in hand and the other on the floor, shot twice through the head. The little girl seems to have testified with much intelligence, and is corroborated in many particulars. She says that her father (the dead man) and his brother (the accused) were playing cards in the yard or on the ground fronting the building in which the accused kept a grocery; that they were betting on the game, and it commencing to rain, they left the yard, going into the grocery, where a cloth was placed on a box and the two renewed the game, the accused sitting in a chair and the deceased on the floor; that her father won one dollar of the accused, when the latter handed it over to him, and then pulled his pistol, shooting him twice in the head. She heard no quarrel between them. The appellant's statement is that he refused to play with his brother, because he was afraid of him, and told him that he had heard he had threatened to kill him, when the deceased replied that they could play and their other brother could keep the game; that they played until it commenced raining, when they went into the grocery and did not play any more; that the deceased became boisterous, and he gave him a dollar to leave; that he put the dollar in his pocket and then made at him with something like a knife, threatening to take his life, and he shot him to protect his own person, believing that his brother would kill him.

The brother, who seems to have been in a stupid condition when the shots were fired, says that they did play in the house, and he went off to sleep. The accused also states that the little girl was not present

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at the time, but had gone to the spring after water, when it is shown by others that she had brought the water before the rain began to fall. The deceased, at the time he was shot, had no weapon. A small barlow knife was found in his pocket unopened, and it is manifest that the murder was the result of a drunken debauch, and that the shooting took place as the little girl states. If all the threats mentioned in the affidavit had been admitted as true, and many were proven on the trial, the accused was guilty of the awful crime of murdering his own brother, with no excuse whatever. He was given the benefit of all the law to which he was entitled. There was an instruction for murder, one for manslaughter, and one that he had the right to defend himself against the assault, if any, made upon him by the deceased. It is insisted that he was in his own castle when the shooting took place, and that he was not compelled to flee, or to resort to means of escape that were apparent. Such an instruction should not have been given. This was a grocery, to which persons were invited. His brother had the right to be there. There was no assault upon him with a deadly weapon. The deceased had only a small knife, and that in his pocket. The history of the case, as stated by the accused, the jury refused to believe, and in our opinion, after a careful review of the testimony, it was a murder without palliation or excuse.

After the jury had returned its verdict in this case, and when the accused was asked if he had any reason to assign why judgment should not be pronounced against him, he responded by saying: That the judge

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then presiding—the Hon. John S. Patton—was not the Judge of the Pike Circuit Court, for the reason that the act of the Legislature regulating the election of circuit judges, &c., in the year 1892, and by virtue of which the said Patton was elected, and now holds his office, is unconstitutional and void; that the requisite constitutional number of votes was not cast in favor of said law at the time of its passage; that different amendments were concurred in by the Senate after it came from the House, and no yeas and nays entered on the Journal at its passage, as the Constitution requires, and that no emergency clause was appended to the bill.

This court in the case of the World's Fair appropriation (Norman, Auditor, v. Ky. Board of Managers, &c., 93 Ky. 537) discussed this question, but in our opinion the case before us is not to be governed by the doctrine of the majority opinion in that case. The Constitution requires that the election of all State officers shall be held on the first Tuesday after the first Monday in November, and this court judicially knows that circuit judges were elected in this State as provided by the Constitution on Tuesday after the first Monday in November, 1892, and that John S. Patton was elected in the district in which he presides, embracing the county of Pike. This was a general State election, and directed to be held by the Constitution, and no emergency clause was necessary, as the provision of the organic law is imperative, and no legislative act could alter its provisions or fix the time for the election on any other day or year, and the omission of the Legislature to

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comply with this constitutional provision will not be allowed to disfranchise the voters of the State, or deprive its citizens or the tribunals created by the Constitution from enforcing the laws of the land. We have for this reason not consulted the Senate Journals on the question made.

Judgment affirmed.

Judge Hazelrigg not sitting.

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CASE 55—PETITION EQUITY—MAY 9.

Supreme Lodge Knights and Ladies of  
Honor v. Owens, &c.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

**TRUSTS—CONTRIBUTIONS FOR CYCLONE SUFFERERS.**—The supreme lodge of a benevolent society having, in response to a "distress call" which it had sent out, received contributions from subordinate lodges for the relief of the families of members of the order who had suffered by a cyclone, it had no right to withhold from distribution any part of the fund thus contributed, the persons for whose benefit it was contributed having the right to the whole. And this is true, although the number of persons injured and the extent of their injuries were less than was estimated in the call, there being no such disproportion between the estimates made by the call and the actual facts as to amount to fraud or mistake.

**HUMPHREY & DAVIE AND JAMES A. BEATTIE FOR APPELLANT.**

1. The moneys sent to the supreme lodge in response to the distress call did not belong to those who were injured, but were simply sent to the supreme lodge to put it in funds so that it could apply them, as it could any other funds it had, in the manner that, in the judgment of its committee, should appear necessary to relieve the distress. (*Pulpress v. M. E. African Church*, 48 Pa. State, 209; *Ould v. Washington Hospital*, 95 U. S., 811; *Attorney-General v. Wallace*, 7 Ben. Monroe, 617-620.)



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2. There being no charge that the committee of the supreme lodge working on the spot acted in bad faith, its judgment was final, and will not be disturbed by the courts. (Supreme Lodge v. Owens, 14 Ky. Law Reporter, 199; Van Poucke v. Netherland, 63 Michigan, 378; Fritz v. Munch, 62 Howard's Practice, R. 70; Niblack on Benevolent Societies, sec. 264.)
3. The surplus fund belonged to the donors, and in the absence of their calling for it, it would be implied that the donors desired the supreme lodge to keep it, to be used, in its judgment, when some future emergency should arise calling for benevolence. (Niblack on Benevolent Societies, sec. 150.)

## LEWIS N. DEMBITZ AND E. S. WATTS FOR APPELLEES.

1. The trust is in favor of a few ascertainable men and women who suffered by the cyclone. It is not a "charity" in its technical sense, but a private trust or benevolence. (Babb v. Reed, 5 Rawle, 151; Niblack Mut. Ben. Soc., sec. 138.)
2. The court will interfere when there is some failure or incapacity on the part of the trustee to act, or where there has been some abuse of trust. There is no discretion of a trustee which a chancellor can not control when it is abused. (Davey v. Ward, L. R. 7 Ch. Div., 754; Re Roper's Trustee L. R., 11 Ch. Div., 272.)
3. Discretion may be controlled by a court of equity, at least to this extent, that the trustee or executor will be compelled to exercise it in some way. (Bull v. Cromie, 81 Ky., 651; Bohon v. Barret, 79 Ky., 378; Berry v. Hamilton, 10 B. M., 129.)
4. If the officers of an incorporated society are about to apply its fund or credit to other purposes than those specified in the charter, a court of equity will interfere by injunction at the instance of one of the members. (Niblack Mut. Ben. Soc., sec. 135; Reeve v. Parkins, 2 Jac. & W., 390.)

## CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT

The Supreme Lodge Knights and Ladies of Honor is an institution organized to promote benevolence and mutual protection and assistance. Besides the Supreme Lodge, it has a number of subordinate lodges. On the night of the 27th of March, 1890, the city of Louisville was visited by a terrible cyclone, which killed and injured a great many persons, and destroyed and damaged a great deal of property. One

of the subordinate lodges in the city of Louisville was known as Falls City Hall. About one hundred and twenty-five of its members and friends were assembled in the hall that night to transact the business of the order; and while they were in the hall for that purpose it was demolished by the cyclone, killing, it was supposed, about forty members, and injuring as many more. On the 29th of the same month, just two days after the sad occurrence, John T. Millburn, the Supreme Protector and presiding officer of the Supreme Order, issued the following distress call to all other lodges of the same order:

“The sad but important duty of laying before you briefly the facts of one of the most unfortunate calamities that has ever befallen our order imposes itself upon me. On the evening of the 27th of March, 1890, a cyclone visited the city of Louisville, Kentucky, passing from a south-eastern portion in a north-western direction, a distance of about two miles, in width about four squares, destroying every thing in its path. Neither tongue nor pen can convey a correct idea of the devastation and suffering that has followed its track.

“It is not my purpose to enter into details, as that which concerns you and the members directly, is the misfortune that befell the visitors and membership of Jewell Lodge No. 2, Knights and Ladies of Honor, which, at the time, was in session at the hall between Eleventh and Twelfth streets on Market street, known as Falls City Hall, a large three-story building, which is utterly demolished, and nearly every thing and everybody in it were victims of the

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calamity. Jewell lodge room was situated in the third story of the building. It was an occasion on which one hundred and twenty-five to one hundred and thirty members were present. There were present for initiation eighteen candidates. The lodge had just gotten fairly to work when it went down in a heap of ruin. All is yet confusion. A corps of laborers has been engaged ever since the accident, excavating and removing the debris, and removing dead bodies. I can safely say, with the committee whom I appointed, composed of Supreme Trustees (naming them), that no less than forty members have been killed, and nearly as many injured, leaving many families and members in sore distress, which can be materially comforted and relieved by prompt assistance. I, therefore, place before you briefly the foregoing facts, without attempting to give the details, as it would require more time and space than the circumstances in this shape would permit, and I call upon you for aid and assistance to relieve the suffering of our brethren, their families and dependants. This matter is one that is addressed to your sympathy and fraternal love. Prompt and immediate action is absolutely necessary. And I feel called upon to say no more on the subject. The committee before referred to will be continued. The Grand Protectors of the several jurisdictions will please report this call to their subordinate lodges. Send all remittances to the Supreme Secretary, C. W. Harvey, Indianapolis, Ind., who will acknowledge receipt of same in the next number of the Intelligencer, and upon proper order the same will be

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turned over to the proper committee for disbursement among the members and their families in distress." It turned out that instead of forty persons being killed, only twenty-two were killed, and thirty-six or more were more or less injured, and several of the injured persons afterwards died of their injuries.

Four thousand nine hundred and fifty-six dollars were sent in in response to this call. The secretary kept back about two thousand eight hundred and thirteen dollars, and instead of sending it to the committee covered it into the treasury of the Supreme Lodge. And the committee returned to the secretary twenty-two dollars of the sum confided to them for distribution among the members and their families, and dependants mentioned in the distress call, making two thousand eight hundred and forty-one dollars covered into the treasury of the Supreme Lodge. The committee distributed said sum among fifty-eight persons, filling the description of the object of the bounty named in the distress call. The committee made said distribution and disbanded before the middle of May. The amount received under the distress call was not published or made known to the committee until it appeared in the *Intelligencer* for July. The said sufferers feeling that they were entitled to all of the fund contributed, sought by negotiation to obtain the sum covered into the Supreme Lodge, and failing to obtain it, they bring this suit to compel its surrender to the court and its distribution among them.

The lodge contends that the relief asked was for the purpose of relieving the necessities of the class

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of persons named in the distress call, resulting from the injuries received by the fall of the building; and the committee appointed for the purpose not only had a discretion as to how much of the fund contributed they would expend, but the proportion that each person was entitled to receive, and that the committee having, in good faith, settled both of these matters, their judgment is final and conclusive. Now, it must be remembered that the distress call did not fix definitely the number of killed and wounded. It was intended as an approximation only—more or less. If there had been more persons entitled to the relief, they would have been entitled to share in the whole fund contributed for that purpose. If less, it seems that they would also be entitled to the whole fund, unless the number entitled to the relief was so disproportionately less than the number estimated in the call, or their injuries so much less than estimated, as to amount to a mistake or fraud, which would entitle the donors to a return of at least a proportionate part of the money contributed. But there was no such mistake or fraud. The percentage below that estimate was not unreasonable.

After describing the accident and its effect, the call is made for contributions for the relief of the sufferers and their families. The call also states that the remittances will be turned over to the proper "committee for disbursement among the sufferers and their families in distress." Now, there was a particular class of persons described as having been killed or injured, and contribution was asked for the relief of them and their families, not to the common

charity fund of the lodge, but the appeal was directly in behalf of the sufferers and their families, and the contributions were to be turned over to a committee, to be distributed among them. The contributions were not to the lodge, to be held by it and distributed or not as it should see proper, but, as said, to a named class of persons, to be distributed among them by a committee, appointed by the lodge, according to their necessities, caused by the injuries received by the falling of the building. The contribution was made by strangers for the specific purpose of relieving the necessities of a particular class of persons, caused by extraordinary circumstances, and it was entrusted to the appellant for that purpose, and for that purpose alone. It had no right to the fund except for the particular purpose of distributing it among the particular class, according to their necessities. And in making the distribution the appellant could not be controlled by a court of equity, for the appellant was the trustee of an express trust for the purpose of making the distribution, and if it acted in good faith in making it, its judgment concluded all parties concerned. Niblack on Mutual Benefit Societies, sections 133 and 147, says, a court of equity will not undertake to interpret a duty of the society, or control it in distributing the money according to its judgment and discretion, that its members have contributed "to a common fund," to be applied to the relief of its members when in sickness, want of employment or other disability. See, also, *Pulpress v. M. E. African Church*, 48 Pa. St., 209, and other cases cited by appellant.

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We agree that where contributions are made to the common fund of a society, or as a special fund, to be used in whole or in part by it at its discretion for the benefit of such members as it might select, or in such proportion as it might agree, a court of equity can not control its judgment, either as to the amount or as to the proportion of the donation among the members. But, as said, the contributors raised a fund and placed it in the hands of appellant as trustee for a specific purpose, and the trustee was not given the power to pay the money or withhold it, or a part of it, at its discretion, but the only discretion given it was the power to distribute it according to the necessities of the donees. It was trustee of an express trust for that purpose alone, and had no power to withhold any part of the fund from distribution, because it was not delegated to it. The money was held in trust for the benefit of the sufferers, which was to be distributed in proportion to their necessities arising from the injuries. The whole was contributed for their benefit, and they, as far as the appellant is concerned, are entitled to it. The contributors having before them a substantial account of the injuries caused by the falling of the building, contributed to the relief of the sufferers according to their inclinations, and appellant can not withhold it.

The general rule is, that in case of contributions for a specific purpose, the contributors may recover back the surplus. (See Niblack *supra*, section 150.) But in a case like this the contributions are made to relieve the necessities of sufferers, and the sum necessary for that purpose is to be estimated by the

contributors; and as the sum necessary for such purpose depends upon the opinion of each contributor, there can be no surplus, and the contributors can not recover back any part of their contributions, unless on the ground of mistake or fraud. But how can the appellant withhold it when there is no complaint by the contributors? Its power as trustee does not extend that far.

Now, if A entrusts B with a sum to be distributed between C and D according to their necessities, B can not withhold a part of it upon the ground that the sum was more than their necessities required, because the nature of B's trust did not authorize him to make the inquiry; his only trust duty was to distribute the fund according to the necessities of C and D. The donor was the judge of the amount that he would give for that purpose. But it is said that the appellant can withhold such part of the fund for the benefit of the contributors, as it may deem the necessities of the donees do not require, and if they do not call for it, the appellant may keep it and use it for the benefit of the next cyclone sufferers or some other sufferers. Well, if the appellant can withhold a part of it, why not all of it, if it concludes that the condition of the donees does not require it. And if the donees complain, the appellant can say that, upon due deliberation, it concludes that they are entitled to no part of the fund, or that upon a close and careful calculation they are entitled to just three dollars and sixty-two and one-half cents, and the balance will be covered in the treasury for the benefit of the contributors, who are scattered all over the country, and



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in all human probability will never call, but in that event the sum will be held for the benefit of the next sufferers. To allow this contention would open the door wide open to fraud. Its only duty was to distribute the money according to the equities of the donees.

The judgment is affirmed.

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CASE 56—PETITION ORDINARY—MAY 9.

Howard, &c., v. Singleton, &c.

APPEAL FROM KNOX COURT OF COMMON PLEAS.

1. **EJECTMENT—PLEADING—BURDEN OF PROOF.**—Plaintiffs in ejectment must show a right of entry in themselves, and a legal estate in the premises existing in themselves, at the time the suit was commenced. And where they claim the land in controversy as the heirs of another, the defendant may, without denying their heirship or the ownership of their ancestor, deny their ownership and assert his claim, without taking upon himself the burden of proving his ownership.
2. **GUARDIAN AND WARD—PARTIES TO ACTION.**—In an action by a guardian under section 490 of the Civil Code for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party; and, therefore, where he is made a defendant, it is not necessary that he should be served with process.
3. **IN AN ACTION FOR THE SALE OF INFANTS' REAL ESTATE,** the sale of land sought for the first time by an amended petition upon which process was not served upon the infants, would have been void had the action been one to which the infants were necessary parties.

**KNOTT & EDELEN FOR APPELLANTS.**

1. Under the Code, there is no such thing as general pleading. (Civil Code, sec. 95.)

And under no system of pleading, common law or Code, can the defendant admit the facts from which the law infers ownership and then merely deny the ownership. If he admits the seizin of the plaintiffs he is required, if he claims title in himself, to plead spec-

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ally his derivation of title. Nor is the mere averment that defendant "claims" a certain specified portion of the land a compliance with subsection 2 of section 125 of the Civil Code.

2. As the amended petition in the case of Letitia Cain, guardian, against John Higgins' heirs, stated a new cause of action, and no summons was ever issued thereon, the judgment for the sale of the land described in that pleading was not operative to divest the infants of title.

## JOHN T. HAYS AND J. SMITH HAYS ON SAME SIDE.

1. As the amended petition stated a new cause of action summons should have been issued thereon. (10 Bush, 544; 8 Bush, 354; 6 B. M., 141; 6 Bush, 395; 88 Ky., 405.)
2. As no guardian *ad litem* was appointed after the amended petition was filed, and no commissioners appointed to report as to the value of the lot, and whether it was to the interest of the infants that it should be sold, the court had no jurisdiction to decree a sale. (Rev. Stat., chap. 86, art. 3, sec. 2; Barrett v. Churchill, 18 B. M., 390; 14 B. M., 295, 535; 6 Bush, 498; 1 Mon., 72; 7 Bush, 505, 362, 604.)
3. It appears that the guardian purchased the lot and transferred her bid to appellee. By the policy of the law, the guardian is forbidden to buy the ward's estate. (Cooley on Torts, p. 523; 80 Ky., 623; 78 Ky., 624.)
4. The court improperly ruled the burden of proof to be upon plaintiffs.

## WM. LINDSAY AND JAMES D. BLACK FOR APPELLEES.

1. The material facts of *present* ownership and right to possession by the appellants and the wrongfulness of their own possession, the appellees specifically put in issue, and then pleaded over ownership and the right to the possession in themselves. Upon the pleadings there could be no recovery, and the burden was on appellants.
2. It matters not how irregular the judgment or sale or conveyance may have been, unless one or the other was absolutely void the possession of the appellees can not be disturbed in an action at law.
3. The amended petition did not seek the sale of any other property than that sought in the original petition, but only corrected a mistake of law as to the title and estate of the defendants, and therefore no summons was necessary.

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellants, as the only heirs at law of John Higgins, who died in 1869, the owner of a lot of ground in Barboursville, Kentucky, brought this suit

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against the appellees for its recovery. In the first paragraph of their petition they set up their heirship, the seizin and ownership of their ancestor and the description of the premises. In the second they allege ownership and right of immediate possession, and aver that the defendants are in the wrongful possession, to their damage, &c. The answer of each of the defendants denies every allegation of the petition, save that of the ownership of John Higgins in 1869, and the heirship of the plaintiffs, and sets up the particular part claimed by each defendant. For this reason it is contended by the appellants that the burden of proof was thrown on the defendants; that, having admitted the facts from which the law infers ownership, they could not then merely deny the ownership.

If the only issue in an action of ejectment were one of abstract title there might be something in this contention, but even then the legal seizin of Higgins in 1869, and the consequent lawful entry and possession of the heirs at that time, are not conclusive evidences of ownership and right of possession in the heirs in April, 1892, when the suit was brought. Suppose Higgins—still living in 1892—had sued, merely setting up his title and rightful possession in 1869, would the admission by the defendants of such facts conclude the question of ownership and right of possession some twenty years later?

The plaintiffs must show a right of entry in themselves and a legal estate in the premises existing in them at the time the suit was commenced. The legal right to the possession as between the parties

at the time of the institution of the action, was the issue in the case. We do not think that the pleas of the defendants changed the general and well established rule that the burden was on the plaintiffs. In discharging that burden, it was developed that the appellants had been divested of the title in question by a commissioner's deed in an action in the Knox Circuit Court, brought in March, 1877, by one Letitia Cain, the guardian of the appellants, for the sale of the property and reinvestment of its proceeds. It is contended by the appellants that the record of this old suit, as exhibited by them in proof, shows the judgment of sale to be void as to the appellants, who were then infants, under fourteen years of age, for the reason that while they were summoned on the original petition, and a guardian *ad litem* was appointed, yet on the amended petition, which, for the first time, sought a sale of the lot now in contest, they were not summoned, and no guardian *ad litem* was appointed for them, nor was any answer filed for them.

The appellees insist that the service of process on the original petition, and the appearance of the infants by their guardian *ad litem*, were sufficient to properly bring them before the court, but it will be observed that the petition only sought a sale of a farm in the county, and not the lot in the town, and it is clear that they were not before the court as defendants, and if the action was such a one as required them to be made defendants, and so brought before the court, the judgment of sale was void. But this old suit was brought under section 490 of

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the Code, by the statutory guardian of the infants in a case where the share of each owner was less than one hundred dollars. This section provides: "That a vested interest in real property jointly owned by two or more persons, may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant.—1. If the share of each owner is worth less than one hundred dollars."

The proper allegations were set up in the amended petition as to the ownership and value of the lot in contest. The report of the commissioners was made showing the necessary facts, and a bond executed fully protecting the rights of the infants, the appellants here. The judgment of the court directing a sale recites these facts, and we perceive no irregularity in the proceedings; certainly nothing rendering the judgment void. Construing section 490, it was held in *Shelby, &c., v. Harrison, Jr., &c.*, 84 Ky., 148: "That the guardian may, unquestionably, bring an action for his ward, and upon the conditions therein prescribed, obtain an order of court for a sale of the joint property without making the ward a defendant." And although the appellants were named as defendants in the old suit, and not served with process on the amended petition, yet they were fully represented in the action by their guardian who brought the action, and who was also their mother.

The evidence introduced showed a complete derivation of title so far as the appellees were concerned, and established the ownership and right of possession in the appellees.

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Johnson v. Commonwealth.

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The peremptory instruction to the jury to find for the defendants was proper, and the judgment is affirmed.

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CASE 57—INDICTMENT—MAY 11.

## Johnson v. Commonwealth.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

TO CONSTITUTE A GOOD INDICTMENT FOR WILLFULLY AND MALICIOUSLY STRIKING ANOTHER WITH INTENTION TO KILL HIM, it is not necessary to allege that the person struck was "bruised" thereby, although that word is used in the statute. It is sufficient to allege that the defendant did willfully and maliciously "strike and wound" him.

HARRY FERGUSON, J. I. LANDES FOR APPELLANT.

1. An indictment which charges the offense of willfully and maliciously striking and *wounding* with intent to kill is not good under a statute which creates the offense of willful and malicious striking and *bruising* with intent to kill, although it may be sufficient to support a verdict and judgment for assault and battery. (Criminal Code, secs. 122, 165; Bishop on Crim. Law, 8d ed., sec. 329.)

The indictment should follow the language of the statute. (Conner v. Commonwealth, 18 Bush, 721; Commonwealth v. Tanner, 5 Bush, 317; Commonwealth v. Turner, 8 Bush, 2; Mitchell v. Commonwealth, 88 Ky., 349.)

2. Malice before the striking must be established before guilt can be imputed. (Rapp v. Commonwealth, 14 B. M., 614; 4 Blackstone's Comm., 199; Aikman v. Commonwealth, 18 Ky. Law Rep., 894.)

The court erred in admitting evidence as to the acts of appellant after the difficulty, as they did not prove previous malice.

3. The appellant ought to have been allowed to prove that the prosecuting witness was not injured by him as much as the Commonwealth alleged, and that, in fact, the injuries were, in part at least, inflicted in another and subsequent encounter with another person.
4. The court erred in instructing the jury *orally*. (Criminal Code, sec. 225; Williams v. Commonwealth, 80 Ky., 318.)

And not only was the objection to this manner of instructing the jury not waived, but counsel might well go further and say that the provision of the law requiring instructions in such cases to be given

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in writing can not be waived. (Payne v. Commonwealth, 1 Met., 370; Coppage v. Commonwealth, 8 Bush, 532; Luby v. Commonwealth, 12 Bush, 1.)

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The word "bruised," as used in the statute, is the correlative of the word "strike," in the second line above it, and is intended to apply to the "other deadly weapon" than a knife or sword set out in the statute. (Commonwealth v. Branham, 8 Bush.)
2. The question as to whether the trial court can, under any circumstances, *instruct a jury orally*, is submitted to the court without argument.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant was convicted of maliciously striking Eldridge Coyle with a large stick—a deadly weapon—with the intention of killing him. The indictment charges that the appellant "unlawfully, willfully and maliciously did assault, strike and wound Eldridge Coyle," &c.

Objection is made to the sufficiency of the indictment, consisting in the fact that the word "bruised" is left out. The language of the statute that relates to cutting, striking, &c., is: "Or shall willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon, with intention to kill, if the person so stabbed, cut or bruised die not thereby." (Gen. Stat., chap. 29, art. 6, sec. 2.) The word "bruised" is evidently used as descriptive only of one of the ways the person may be injured. It seems that to cut, stab or bruise a person under the circumstances mentioned, is all that is contemplated by the statute, and any language that expresses the fact may be used. To wound him by striking him with a stick is certainly equivalent language. This is all that is necessary to be noticed.

The judgment is affirmed.

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Wright, &c., v. Baker.

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CASE 58—MANDAMUS—MAY 11.

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Wright, &amp;c., v. Baker.

APPEAL FROM LETCHER CIRCUIT COURT.

1. MANDAMUS DOES NOT LIE to compel a county judge to issue a writ of *ad quod damnum* for the purpose of condemning land upon which to build a school-house, as his action upon an application by the trustees of a school district for such a writ is judicial and not ministerial.
2. THE TRUSTEES OF A COMMON SCHOOL DISTRICT are created a body-politic, and when they sue as such a body the withdrawal by some of the trustees of their names as plaintiffs does not affect the proceeding.

S. B. DISHMAN AND H. C. FAULKNER FOR APPELLANTS.

The county judge acts ministerially upon the application for the writ of *ad quod damnum*, and, therefore, mandamus lies to compel him to issue the writ. (Gen. Stats. chap. 186; Common School Law, art. 8, sec. 6; McDonald, Justice, &c., v. Jenkins, &c., 14 Ky. Law Rep., 157; s. c., 98 Ky., 249.)

TYREE &amp; ADAMS FOR APPELLEE.

1. As only one of the trustees is suing, there is a defect of parties. (Civil Code, sec. 24.)
2. The county judge acted judicially in refusing the writ, and, therefore, mandamus does not lie. (Commonwealth for, &c., v. Boone County Court, 82 Ky., 682.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The trustees of common school district No. 7, of Letcher county, having selected a parcel of land as the most suitable for a school-house site, and being unable to agree with the owner as to its price, he, in fact, declining to sell at any price, made application to County Judge Baker for a writ of *ad quod damnum*. This was made by petition, and Moses Bently, the owner of the land, was made a defendant. He appeared and filed an answer, alleging that



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the place sought to be condemned was not as near as practicable to the center of the district as would be convenient of access to all the inhabitants thereof; and that the contemplated site was set in fruit trees, and was in use as an orchard. The act provides that the trustees "shall not have the right to condemn any private property which is used as a residence, garden, orchard or burying-ground." After hearing the evidence, the court refused to issue the writ. Thereupon, the trustees filed their petition in the circuit court, setting forth the facts connected with the refusal of the judge to issue the writ, and, after notice, moved the court for a writ of mandamus against the county judge to compel him to issue the writ in question. The issues of fact and of law were all gotten before the court by demurrers and other pleas, and on hearing, the court dismissed the petition, and the trustees have appealed to this court. They rely on the provisions of section 6, article 8, chapter 96a, General Statutes, as entitling them to a writ of *ad quod damnum* as a matter of right upon their application, as made to the county judge.

That section gives them the right, with the consent of the county superintendent, to "take land, by purchase or donation, for the purpose of erecting thereon a school-house;" and "if they can not agree with the owner of any land most suitable for a school-house site, as to the price and terms of purchase and sales thereof, they shall apply to the judge of the county court by petition, in which they shall set forth, by metes and bounds, the lands they seek to condemn,

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Wright, &c., v. Baker.

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and the county court shall issue a writ of *ad quod damnum*, directed to the sheriff, to be executed and returned to said court as in case of condemning lands for the use of railroads and turnpike companies."

In this case all the necessary requirements and conditions existed, entitling the applicants to the writ, as shown by their petition before the county judge, and the question is, did that judge have any discretion as to its issual, and should he have allowed the answer to be filed?

It is argued that in proceedings for the condemnation of lands for turnpike and railroad purposes, to which the school law refers, such writ must issue upon application as a matter of right; but on examination of the statute on this subject, chapter 18 b, pages 281, 282, General Statutes, we find that upon the proper application made, the county court is required to appoint commissioners to assess the damages, who proceed as directed by the statute *ex parte*, and, after filing their report, a summons is issued against the owner of the land sought to be condemned, to show cause why the report shall not be confirmed, and the court shall examine the report, and if it be in conformity with the act regulating the proceedings, may confirm same to the extent only to which no exceptions have been filed; and when exceptions are filed, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, the court sending the jury to view the land if desired. If sufficient cause be not shown for setting aside the verdict, the court will render judgment in conformity thereto.

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It will be observed that in this proceeding ample opportunity is afforded the land-owner to raise any issue of law or fact concerning the right to take his land. The matter of damages is not alone to be determined. This is the question submitted to the jury on the writ of *ad quod damnum*, but the court must determine, as a matter of law, whether the report taking the land is in conformity with the act, and the owner is allowed to show, if he can, why his land shall not be taken. Matters of law and of evidence are submitted, and the judgment of the court is necessarily a judicial one, and involves discretion on the part of the court. Before the jury is called on to assess the damages for the actual taking, the right to take under the particular law of the procedure must be first determined. And this must be and is true of the provisions of the school law, else the act would be violative of the Constitution.

Some legal tribunal must pass on the question of whether an orchard is about to be taken, or a garden or burying-ground; and these determinations are not ministerial but judicial acts. The provision that "one-third of the school electors of any district may appeal from the decision of the trustees in the location of the school house, or site for the same, to the county superintendent of the county, whose decision in the case shall be final," does not affect the land-owner or abridge his right to have the condemnation proceedings conform to the law purporting to authorize them. The act of county judge Baker, therefore, in dismissing the petition and denying the right of the trustee to condemn the particu-

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lar land in question, however erroneous it might have been, was a judicial one, and was not the subject of mandamus proceedings.

The effort by the two Bentleys to withdraw their names as plaintiffs in the action, did not affect the proceeding. The trustees of district No. 7 are created a body-politic, and may sue, and in this case did sue, as such body. The individuals might have withdrawn, because they did not want to be individually bound for costs. Nor was it proper to allow Baker, the county judge, to file an answer raising the issues of fact as to the location of the site. He has nothing to do with those issues, and can not make them, though, as judge of the county court, he decided them. His connection and interest with the case then ends.

But his judicial action not being controllable by mandamus, the judgment dismissing the petition therefor is affirmed.

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CASE 59—PETITION EQUITY—MAY 18.

Mitchell, &c., v. Campbell, &c.

APPEAL FROM WASHINGTON CIRCUIT COURT.

**CONSTRUCTION OF DEVISE—DEFEASIBLE FEE.**—A devise of an estate, generally or indefinitely, with a power of disposition, carries a fee. But in construing the instrument in cases where the party has a power and also an interest, the intention is the great object of inquiry.

A testator, after devising his estate to an unmarried sister to enable her to take care of the children of a deceased sister, provided that if the sister should be alive when the children mentioned were "raised and old enough to no longer require care of guardian and support,"

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Mitchell, &c., v. Campbell, &c.

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she should "continue the ownership of the estate and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is that my brothers are to dispose of the estate for the benefit of my heirs at law." *Held*—That the sister took the fee defeasible upon the contingency of her dying without children, and, therefore, as she died leaving children, one to whom she conveyed the fee became invested upon her death with the absolute title.

**J. W. S. CLEMENTS FOR APPELLANTS.**

1. It will not be presumed that the testator intended to create an estate tail, such estates being forbidden by law. (*Moore v. Howe*, 4 Mon., 221; *Moore v. Moore*, 12 B. M., 659.)
2. The words "heirs of her own body" are to be construed as synonymous with *children*, and the will, therefore, vested the mother with only a life estate, remainder to her children. (*Jarvis & Trabue v. Quigley*, 10 B. M., 104; *Mitchell v. Simpson*, 88 Ky., 125.)

**W. E. SELECMAN FOR APPELLEES.**

The mother took the fee defeasible only in the event of her dying without children. (*Parish v. Parish*, 9 Ky. Law Rep., 281; *Thackston v. Watson*, 84 Ky., 210.)

**THOMAS W. SIMMS ON SAME SIDE.**

The mother of appellants was vested with the fee subject to be defeated in the event of her dying without children.

The plain intention of the testator as gathered from the whole instrument must control. (*Field v. Leiter*, 118 Ill.; *Whitehurst v. Boyd*, 8 Ala., 375; *Steele v. Branch*, 40 Cal., 3; *Brown v. Slater*, 16 Conn., 192; *Thackston v. Watson*, 84 Ky., 210; *Redfield on Wills*, vol. 1, p. 487.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

A. E. Goatley having conveyed her property to appellee Campbell, in trust for benefit of creditors, he brought this action for settlement of his transactions as trustee and for sale of her property, including a tract of one hundred and eighty-five acres now in controversy for payment of debts; and at the March term, 1892, of the court, a judgment was rendered for sale as prayed for in the petition.

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But at the September term, 1892, appellants R. W. Mitchell, A. R. Mitchell and Hugh T. Mitchell, were, on their motion, made parties defendants, having filed a petition which was treated as an answer and cross-petition.

They state, in substance, that their mother, Maria Jane Mitchell, formerly Walker, died about eight years previously, leaving them her only children. That though she and her husband, father of defendants, in 1866 sold and conveyed absolutely the one hundred and eighty-five acres in question to R. P. Goatley, under whom A. E. Goatley claims, she, their mother, had only a life estate, remainder in fee being vested in them by the will of her brother and their uncle, Robert L. Walker, from whom the land was derived. Whether they have any interest in the land must, of course, depend upon proper construction of that will, dated in 1851 and admitted to record in 1854.

Except ten or twelve acres of land the testator stated he had promised to let his brother Murry Walker have, and desired conveyed to him, all his estate of every kind was in express terms devised to his mother and sister Maria Jane, to be held as a means of support for themselves, and to enable them to care for the children of his sister Emily Plat. But it was provided that in case Maria Jane died before those children were raised, he desired his brothers Murry and John, one or both, to take charge of the children and property, in conjunction with his mother, if living, and carry out his wish in regard to them, and to ultimately dispose of his estate for benefit of

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his heirs, though his mother was not, in any event, to be disturbed in her possession and ownership of the property.

Provision in case of his sister Maria Jane being alive when the children mentioned were "raised and old enough to no longer require care of guardians and support," is in the following language: "But if my sister Maria Jane is living, she is to continue the ownership of the estate, and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is, that brothers John and Murry Walker are to dispose of the estate for the benefit of my heirs at law."

Whether Maria Jane Walker took under the clause quoted the fee, or an estate for life with power of disposition, is the main and decisive question.

It is a well established rule that a devise of an estate generally or indefinitely, with a power of disposition, carries a fee. But as said in Kent's Commentaries, volume 4, 335, "in construing the instrument, in cases where the party has a power and also an interest, the intention is the great object of inquiry."

We do not think there is much difficulty in determining what was the testator's plan for disposing of his estate; for it was evidently well considered and matured. The term "ownership," used to describe the quantity of estate he intended his sister Maria Jane to have, according to its common signification, comprehends a fee, and can not be prop-

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erly restricted so as to mean a mere life estate. And the proviso of her leaving heirs of her own body, who were to take the estate, was obviously intended to be operative only in case she died intestate, and not to limit the estate already given to her. For their absolute right to take it can not be at all reconciled with her unqualified power to do as she pleased with it at her death. Moreover, if the testator had intended to restrict the devise to a life estate, it is a reasonable supposition he would have used the word children instead of heirs, to indicate who were at all events to take at her death.

When the will was written, Maria Jane was unmarried, and it is very plain he intended she should have the fee defeasible upon the contingency of her dying without children and passing to his heirs, who, in that case, would have been her right heirs.

Then as she acquired a fee, power existed to dispose of the land in question by either deed or will, subject, however, to defeat of the title conveyed upon the contingency mentioned, and the words "at her death" were evidently not intended, and did not have effect, to qualify that power, but were used rather to negative the idea of a life estate.

As, therefore, the contingency upon which alone the fee with which Maria Jane was invested was to be defeated, did not happen, Goatley became invested, in virtue of the deed of herself and husband, Mitchell, with absolute title to the land in question.

Judgment affirmed.



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McFatridge, &c., v. Holtzclaw.

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CASE 60—PETITION EQUITY—MAY 16.

## McFatridge, &amp;c., v. Holtzclaw.

APPEAL FROM MERCER CIRCUIT COURT.

**CONSTRUCTION OF DEVISE—PER CAPITA DISTRIBUTION**—Under a devise of property by a testator to be equally divided between the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living," the children of the testator's brothers and sisters take *per capita* and not *per stirpes*, their parents being alive not only at the date of the will, but at the date of its publication.

**POSTON & JACOBS, GAITHER & VANARSDALL FOR APPELLANTS.**

The word "heirs" was used in the sense of children. (Thurman v. White's heirs, 14 B. M., 578; Harper v. Wilson, 2 A. K. Mar., 466; Feltman v. Butts, 8 Bush, 12.)

The words "equally divided," and "share and share alike," clearly import a distribution *per capita*. (Purnell v. Culbertson, 12 Bush, 369; Brown's Ex'or v. Brown's devisees, 6 Bush, 648.)

**PHIL. B. THOMPSON, SR., FOR APPELLEES.**

A distribution *per stirpes*, and not *per capita*, was intended.

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

By the last will of S. S. McFatridge, he willed his estate to his wife for life. He willed the remainder interest in his estate as follows: "After the death of my wife, I wish my property disposed of and equally divided between the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living."

The testator had no children, and at the time of his death and the publication of his will his two brothers, William and Harvey McFatridge, and his sister, Mrs. Holtzclaw, were living. One brother had

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four children, one had two, and the sister had one. The widow of the testator having died, the question is, how do the children of the brothers and sister take—*per capita* or *per stirpes*?

In the case of *Purnell v. Culbertson*, 12 Bush, 371, Jarman on Wills, and other authorities, are quoted as establishing the following propositions: "Where the gift is to the children of two or more persons the division must be *per capita* and not *per stirpes*; as where the devise is to testator's brother A and the children of his brother B, there B's children each get as much as A; and where the testator gave two shares of his estate to the children of his sons A and B, to be equally divided between them, it was held that each of said family of children took *per capita* and not *per stirpes*. \* \* \* The words 'equally to be divided,' when used in a will, mean a division *per capita* and not *per stirpes*, whether the devisees be children and grandchildren, brothers or sisters, nephews or nieces, or strangers in blood to the testator."

According to said case there can be no doubt that the words "equally divided between the heirs of my brothers and sisters, share and share alike," taken alone, mean that the devisees take *per capita* and not *per stirpes*.

But the words, "as though my brothers and sisters were living," are added. So the question is, do said words change the meaning of the preceding words, so as to make the children take *per stirpes* and not *per capita*? As said, the preceding words, considered without reference to the latter

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words, clearly and unequivocally mean that the children of the brothers and sisters take *per capita* and not *per stirpes*, because they take equally from the testator and not as the representatives of their parents. They are named as children (heirs) of the testator's brothers and sisters as descriptive only of the class of persons that are to take, and the clause, "as though my brothers and sisters were living," if it has any significance whatever, it is certainly not that of limiting the right of the children to take *per stirpes* as the representatives of their parents. They were not only living at the date of the will, but at the date of its publication. And the reference to the devisees as the children (heirs) was descriptive only of the persons that were to take the estate. And if any meaning is to be given to the clause last quoted, it seems that it was intended to emphasize the fact that the children were to take *per capita*; for if the testator's brothers and sisters had been made the objects of his bounty, nothing in the will to the contrary, they would have taken *per capita*—share and share alike—and their children were to "share and share alike" the same as their parents would, if living and taking equal portions. This construction gives effect to both clauses of the provision quoted; but the construction placed upon the provision by the lower court destroys the first clause, giving the devisees equal portions of the estate, and makes them take *per stirpes* as the representatives of their parents.

The judgment is reversed, and the case is remanded with directions to enter judgment in accordance with this opinion.

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Chesapeake and Ohio Railway Company, &c., v. Mullins.

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CASE 61—PETITION EQUITY—MAY 17.

## Chesapeake and Ohio Railway Company, &c., v. Mullins.

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APPEAL FROM KENTON CHANCERY COURT.

1. **MUNICIPAL CORPORATIONS—NOTICE OF ORDINANCE FOR CONSTRUCTION OF SIDE-WALKS.**—Where a city charter authorized the city to construct side-walks and assess the cost of construction against abutting property, provided that the owners of such abutting property should, for the period of fifteen days, have the privilege of doing the work themselves, notice to the lot-owner of the passage of the ordinance or resolution providing for the improvement was necessary in order to give a lien for the cost of construction; but *actual* notice was not required. The passage and publication of the ordinance furnished the owner with constructive notice, which was sufficient.
2. **ACTUAL NOTICE** is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice.

**HALLAM & MYERS FOR APPELLANT.**

1. The city charter requires actual notice to property owners before the city can construct a side-walk and charge the property with the expense of it. The act of 1882 requiring such notice was not repealed by the amendment of April 28, 1884.
2. The city council had no right, regardless of the charter, to charge abutting property with the cost of constructing side-walks without first notifying the property-owner and affording him an opportunity to do the work himself.

**D. A GLENN FOR APPELLEE.**

The proceedings of the council were regular, the appellant had notice provided by law, and the judgment should be affirmed.

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT**

The city of Covington, by ordinance, ordered the construction of a sidewalk in front of the appellant's property. The appellant having failed to construct

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Chesapeake and Ohio Railway Company, &c., v. Mullins.

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the sidewalk, it was constructed by the appellee as contractor. He now sues the appellant for the price of construction and for an enforcement of a lien on the property.

By section 1 of the act to amend the city charter, approved April 28th, 1884, it is provided in substance that the city of Covington shall have authority, by ordinance or resolution, by a vote of a majority of the board, without the petition or consent of the property-owners, to order or cause the construction of the sidewalks of any street, or any part thereof, &c., within the city, in such manner and with such material as it may deem best. It shall have authority to assess the costs of such construction, &c., against the lots or parts of lots, &c., in front of which the sidewalk is constructed or repaired, &c.; and a lien is given on the lots, or parts of lots, for the contract price, which shall attach from the time of the passage of the ordinance or resolution, and which may be enforced by the contractor or the city of Covington: Provided that the owners of said lots, &c., for the period of fifteen days after the passage of the ordinance or resolution, shall have the privilege of doing the work in the manner provided by the council.

Does the city charter require actual notice to the property-owners before the city can construct sidewalks, and charge the property with the expense of it? The section above referred to certainly does not require actual notice to the owners of the property. The section repeals the amendment of 1882 requiring actual notice to be given to the property holders.

Is it necessary that the property-owners shall

have actual or constructive notice before subjecting their property to the burden of constructing sidewalks, &c.? We think that actual or constructive notice is necessary. The State has the right to confer upon the towns and cities the right of local government, and to confer upon them such police powers as are necessary for their health, comfort, convenience, prosperity and happiness. These powers are granted and regulated in their respective charters. Their power to burden the property within their limits and make it contribute to these purposes, is given by their charters, which usually provide for giving the owners of the property notice, either actual or constructive, before taking it for such purposes. Actual notice is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice. Here the charter authorized the city of Covington, by ordinance or resolution, to make the abutting property pay the expense of constructing sidewalks, &c. There is no complaint that the ordinance in reference to the construction of the sidewalks in controversy was not, in every respect, regular and published in conformity to the requirement of the charter, thus making it a complete constructive notice to the appellant that its property was required to bear the expense of constructing the sidewalk, and which is all that is required by the charter.

The judgment is affirmed.

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Stamper, &c., v. Hibbs, &c.

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CASE 62—PETITION EQUITY—MAY 17.

**Stamper, &c., v. Hibbs, &c.**

APPEAL FROM CARTER CIRCUIT COURT.

**FRAUDULENT CONVEYANCE—ASSIGNMENT BY OPERATION OF LAW.—**

Where a creditor assails a transfer made by his debtor upon the ground of actual fraud and obtains his attachment, he has, upon establishing the fraud, a prior lien, and other creditors coming into the action have subordinate liens, dating from the filing of their petitions. And in the absence of any pleading bringing the case within the statute against fraudulent preferences, it is error to the prejudice of the debtor to adjudge that there has been an assignment by operation of law of all his estate for the benefit of creditors.

**STONE & SUDDUTH, Z. T. YOUNG FOR APPELLANTS.**

Under a suit to set aside a conveyance as absolutely fraudulent, a judgment can not be rendered declaring a preference. (*Wintersmith v. Pointer*, 2 Met., 460; *Beatty v. Dudley*, 80 Ky., 381.)

**E. B. WILHOIT FOR APPELLEES.**

1. The appellant Wm. Stamper shows by his answer that he has no interest in the property adjudged to be sold, and he nowhere shows that his substantial rights are affected by the judgment.
2. The evidence establishes the alleged fraud.

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

This judgment as to William Stamper must be reversed. There is no charge of a fraudulent preference made by William Stamper for the purpose of securing creditors, and therefore it was improper to adjudge that, in contemplation of insolvency, and with a design to prefer, he had conveyed his property. When constructive fraud exists by reason of the statute, the title to the entire estate of the debtor passes by operation of law to his creditors, and this statute was enacted to prevent a failing debtor from

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giving a preference to one creditor over another, and where a preference is made all creditors share alike, unless there are *bona fide* liens; but in case of actual fraud the creditor who assails the transfer on that ground and obtains his attachment, there being no pleading to bring the case within the act of 1856, has his prior lien, when establishing the fraud, and other creditors coming into the action have subordinate liens dating from the time of filing their petitions. It is claimed that William Stamper has no interest in this controversy. He has this interest: His entire estate is made to pass to all creditors by the judgment when there is neither pleading nor proof authorizing it.

Judgment reversed as to appellant William Stamper, and affirmed as to the other appellants.

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CASE 68—INDICTMENT—MAY 18.

94	359
125	739
125	748

## Kneffler, &c., v. Commonwealth.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. **DISORDERLY HOUSE.**—An actual disturbance of the public peace is not indispensable to constitute the offense of keeping a disorderly house. It is enough that acts be there done contrary to law and subversive of public morals, health or safety.
2. **SAME—GAMBLING IN FUTURES.**—A place where persons habitually assemble to bet or wager money or property on the prospective rise and fall in the prices of stocks, bonds, grain, etc., is, in law, a common gambling house, and the person owning and controlling it is guilty of the offense of keeping a disorderly house, although there is no penal statute applicable to that particular species of gambling.



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Kneffler, &c., v. Commonwealth.

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**H. MARSHALL BUFORD FOR APPELLANTS.**

The case at bar comes within the rules laid down in *Sawyer, Wallace & Co. v. Taggart*, 14 Bush, 281, 282, and is unlike the cases of *Smith v. Western Union Telegraph Co.*, 84 Ky., 664, and *Beadles, Wood & Co. v. McElrath & Co.*, 85 Ky., 280.

**W. J. HENDRICK, ATTORNEY-GENERAL, AND R. REID ROGERS FOR APPELLEE.**

The "buying" and "selling" of stocks, grain, &c., without any intention of making actual delivery or of receiving the property so bought or sold, but merely for the purpose of speculating on the prospective rise and fall of prices, constitutes gambling, and a place where persons habitually assemble for that purpose is a disorderly house. (*Smith v. Western Union Telegraph Co.*, 84 Ky., 664; 6 Am. & Eng. Enc. of Law, 101; *Cheek v. Commonwealth*, 79 Ky., 859.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

Appellants were convicted of the offense of keeping a disorderly house, charged in the indictment to have been committed by them in occupying and controlling, under the firm name of G. W. Kneffler & Co., a house in the city of Lexington, where they unlawfully permitted divers persons to habitually assemble and habitually engage in betting, winning and losing money and property, on the prospective rise and fall in stocks, bonds, grain and other produce, to the common nuisance and annoyance of all citizens of the Commonwealth of Kentucky, and especially those living in the neighborhood of said house and passing same.

An actual disturbance of the public peace is not indispensable to constitute the offense of keeping a disorderly house. But it is enough that acts be there done contrary to law and subversive of public morals, health or safety. And, consequently, it has been held by this court that a common gaming house is in

legal contemplation a disorderly house. (*Chéek v. Commonwealth*, 79 Ky., 359.)

The first question then is, whether the house of appellants, kept and used for the purpose and in the manner described in the indictment, is a common gaming house?

The purpose for which the house was kept and persons assembled there was, as stated in the indictment, simply to bet or wager money or property on the prospective rise and fall of stocks, bonds, grain and other produce. There is no suggestion in the indictment that the business of buying and selling, accompanied with delivery of any of the articles mentioned, was carried on there. Consequently, as said in *Smith v. Western Union Telegraph Co.*, 84 Ky., 664, in regard to a similar establishment, "a mere statement of the character of business done by appellant shows it to be a species of gambling, as well defined and as reprehensible as that of keeping a faro-bank or a dice machine, and is, therefore, illegal and contrary to public policy." In that case, upon the ground "appellant was engaged in a gambling enterprise, contrary to law, good morals and public policy," the telegraph company was relieved of any obligation to transmit messages as a means of carrying on his illegal business.

In *Beadles, Wood & Co. v. McElrath & Co.*, 85 Ky., 230, it was held that a contract, though in form one for sale and future delivery of personal property, yet entered into with no intention to deliver, but to be carried out by a mere settlement of difference between the contract price and market price on the day for

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Breckenridge Company (Limited) v. Hicks.

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delivery, is a mere wager not enforceable. And in *Lyons v. Hodgen & Miller*, 90 Ky., 280, it was held such contract was, in meaning of sections 1 and 2, article 1, chapter 47, General Statutes, a wager, and a party was entitled to recover back from another engaged in such transaction, money lost by wagering upon future rise and fall in price of bonds, stocks, provisions or other personal property, and paid in settlement of differences between contract and market prices, when no delivery was made or intended.

There does not seem to be any penal statute applicable to that particular species of gambling. But it seems to us clearly that the place where it is habitually carried on is, in law, a common gambling house, and the person owning and controlling it guilty of the offense of keeping a disorderly house.

The instruction given to the jury fully and accurately states the circumstances and conditions that must exist, in order to constitute the offense charged in the indictment, and as there was, in our opinion, evidence to support the verdict, the judgment is affirmed.

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CASE 64—PETITION ORDINARY—MAY 20.

## Breckenridge Company (Limited) v. Hicks.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

**FAILURE OF MASTER TO COMPLY WITH PROMISE TO REPAIR—RISK ASSUMED BY SERVANT.**—Where the master is notified by the servant of a defect in the appliances or premises furnished for the servant's use, and promises to remedy the defect, the servant, by continuing in the

94	362
108	166

94	362
114	8

94	362
137	423

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Breckenridge Company (Limited) v. Hicks.

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master's service for a reasonable time after the promise to repair, does not assume the risk, and if by reason of the defect he is injured within that time the master is liable. The servant assumes the risk only where, with knowledge of the defect, he continues in his work without any promise upon the part of the master to repair, or where, although the master has promised to repair, such a length of time has elapsed since the promise was made that the servant has no right to believe that the master intends to comply with his promise.

A miner called the attention of the "mining boss" to loose rock in the roof of the room where he was at work, and the "boss" promised to send in timbers for the purpose of propping the roof. The attention of the "boss" was called to the matter a second time, and he said he had forgotten it. Two days after the original promise by the "boss" to repair, the miner, concluding the props would not be sent in, resolved for that reason to quit work, and as he was leaving the mine a rock fell upon him, crippling him for life. *Held*—That the master is liable.

**BULLITT & SHEILD FOR APPELLANT.**

As appellee continued in the employment of appellant with knowledge of the danger, he can not recover. (Hughes v. C., N. O. & T. R. Co., 13 Ky. Law Rep., 72; Sullivan, etc., v. Louisville Bridge Co., 9 Bush, 89; Bogenschutz v. Smith, 84 Ky., 330; Needham v. L. & N. R. Co., 9 Ky. Law Rep., 65; Derby's Adm'r v. Ky. Central R. Co., 9 Ky. Law Rep., 92; Shearman Redfield on Negligence, secs. 92 and 93; Bigelow on Torts, 301; Griffin v. O. & M. Railway Co., 24 N. E. R., 388; Vincennes Water Co. v. White, 24 N. E. R., 747; Johnson v. Ashland Water Co., 45 N. W. R., 307; Nance's Adm'r v. N. N. & M. V. R. Co., 13 Ky. Law Rep., 556-7.)

**FARLEIGH & STRAUS AND DAVID R. MURRAY FOR APPELLEE.**

Where the master, when notified of a defect in the machinery or premises, promises to remedy it within a reasonable time, the servant, by remaining in the service for such reasonable time, does not waive his right to recover in the event he is injured by reason of the defect. (Bogenschutz v. Smith, 84 Ky., 330; McDowell v. Chesapeake, &c., R. Co., 8 S. W. Rep., 371; Beach on Cont. Neg., sec. 140.)

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

The appellee Hicks, in working the mines of the appellant, received a serious personal injury by the falling of a stone upon him from the roof of the quarry or mine while in the employ of the company,

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Breckenridge Company (Limited) v. Hicks.

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and has recovered four thousand dollars in damages on the ground that the injury resulted from the negligence of the company's employees.

In order for the protection of miners, and to prevent such injuries from falling stones, the roof above the miner is supported by props that are furnished by the company, and where the distance under the mines from the entry is considerable, these props are hauled in by cars that are used in bringing out the coal. Sometimes the miners themselves carry the props on their shoulders to the places wanted, but the evidence in this case conduces to show, and without contradiction, that it is the duty of the company to furnish them at the place designated or deemed necessary for their use. The appellee and his fellow-laborers were experienced miners, and, apprehending danger, or thinking there was a necessity for props where they were at work, had laid out timbers, such as they wanted to use for props, and marked them so as those whose duty it was to bring them in would have no difficulty in getting such props as they wished.

The *haulers*, as they are termed, were told several times to bring them in, but failed. The mining boss had been in the room where this appellee was at work two days before the accident, and his judgment consulted as to the danger. He was shown some loose stone in the roof, over the road, and wanted the workmen to brace it, and was told it would cost no more to take it down; Hicks, appellee, remarking that they could not get timbers to brace their room up, or roof above, much less the roadway. The boss then promised to send timbers

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Breckenridge Company (Limited) v. Hicks.

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in. The very day of the accident, the employes or haulers were told to bring the timbers in by Hicks, and Dickerson, who was at work with Hicks, says they were told every day. This boss was told a day or two before the injury that the props ought to be sent in, and his reply was, "damn it, I forgot it."

Hicks and Dickerson were the only ones working in the room at the time of the injury, and finding that no props would be sent in, resolved to quit work, and in leaving, Hicks having gone into one corner of the room for oil to fill his lamp, in returning this rock fell upon him, crippling him for life. Dickerson says it was not the rock above their heads where they had been digging, and if the testimony of these witnesses is to be credited, it is evident that the personal injury resulted from the neglect of the defendant's employes.

We have given the testimony for the appellee bearing on the main question, all of which is, in effect, controverted by the testimony for the appellant, and the sole question in this case is, should the court have instructed the jury to find for the defendant? A peremptory instruction was based on the idea that this appellee, knowing the danger, voluntarily continued his work, in a place where he knew, or must be presumed to have known, that he was in danger of great bodily injury. The cases of Sullivan's Adm'r v. The Louisville Bridge Co., 9 Bush, 81, and Bogenschutz v. Smith, 84 Ky., 330, as well as other similar cases, are relied on as sustaining this doctrine. The doctrine contended for is well understood, and if the testimony for the appellee brings

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this case within the rule, then the verdict below should have been for the defendant.

In Sullivan's Adm'r v. The Bridge Co. there were two planks placed side by side from a barge filled with stone to a crib into which the stone was being placed. The workman used the plank in carrying the stone for days, making no complaint, and finally fell off the plank and was drowned. He knew the danger, saw what he had to stand on, made no complaint, and after his death it was insisted that proper protection to his person had not been afforded by his employer. This court said he voluntarily placed himself in the position from which he fell, knew the danger, and by the exercise of proper care might have avoided it. The same question arose in Bogenschutz v. Smith, 84 Ky., 330, and in Hughes v. Railroad Co., 91 Ky., 526. It will be assumed in this case that both the employer and employe knew of the danger, or from the facts had the right to apprehend it. Then the question arises, did Hicks waive the danger, and voluntarily assume to work without looking to the employer for these props? If Hicks, knowing the danger, continued in his work without complaint, or rather without requiring of his superior to provide these props, then he can not recover, and this is the rule recognized by the cases to which our attention has been called by counsel for the appellant. Suppose, however, the superior is notified of the danger, and the necessity for these props, and promises to furnish them in a reasonable time, then the workman may continue his work, and will not be adjudged to have waived the right of

exacting this duty of his superior by remaining this reasonable time in the service.

This is the doctrine of all the text-books with reference to machinery, and the appliances to be used by the laborer in the discharge of his duties. (Beach on Contributory Negligence, page 372.) This court said, in *Bogenschutz v. Smith*, 84 Ky., at page 340: "But generally if a servant knows that the machinery or material furnished him for work is defective and unsafe, *or that the premises where he labors are dangerous*, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master for injury therefrom." The ordinary risks and danger in this kind of labor the appellee assumed when he undertook the work, and while this danger may be anticipated either with or without supporting the roof above, where the laborer continues to discharge his duties for a few days, believing, and having the right to believe, that the support required will be furnished him, there seems to us to be no valid reason for determining that such conduct is a waiver of the right of recovery, when, if the superior had complied with his promise, no injury would have been inflicted. The course pursued by the appellee was rational, and under the belief that all danger would be averted by a compliance by the boss with his promise, and when he saw that danger was actually impending was leaving to avoid it when the stone fell. The right of recovery exists if the testimony of the appellee and his co-workman is to prevail.

Judgment affirmed.



## Louisville and Nashville Railroad Company v. Earl's Adm'x.

CASE 65—PETITION ORDINARY—MAY 23.

Louisville and Nashville Railroad Company v.  
Earl's Adm'x.

## APPEAL FROM HART CIRCUIT COURT.

## 1. NEW TRIAL—PLAINTIFF REQUIRED TO REMIT PART OF VERDICT.—

In this action to recover damages for personal injuries, the court had no power to require the plaintiff, in order to avoid a new trial, to accept judgment for a less amount than that found in his favor by the jury, and upon appeal by the defendant from the judgment for the reduced amount, which plaintiff accepted under protest, there must be a reversal, either upon the appeal or cross appeal, as the court should have granted defendant a new trial, if there were errors to its prejudice, and, if not, should have rendered judgment for plaintiff in pursuance of the finding of the jury.

## 2. IT WAS INEXCUSABLE NEGLIGENCE ON THE PART OF A FIREMAN ACTING AS ENGINEER to leave a detached car standing on the side-track of a railroad in such close proximity to the main track as not to allow a man's body to pass between the car and moving cars on the main track, and a brakeman riding on the ladder of a car on the main track, going from one point of work to another, was not guilty of such contributory negligence as to preclude him from recovering of the company for injuries received by him by being crushed between the moving car and the car on the side-track, it being the custom of brakemen to ride in that way in the discharge of their duties.

## 3. EVIDENCE—RES GESTÆ.—Statements made by the injured brakeman as to how the injury occurred having been brought out by defendant, it was competent for plaintiff to prove all that was said, as all the statements were made within a few seconds and evidently formed part of the same conversation. Besides, as the expressions were within a few seconds after the accident, they were competent as forming part of the transaction.

## 4. INSTRUCTIONS.—An uncontradicted fact may properly be assumed in an instruction.

## 5. PUNITIVE DAMAGES.—Gross negligence is sufficient to warrant the finding of punitive damages, and, therefore, so far as the instructions in this case required the jury to find willful neglect in order to give punitive damages, they were too favorable to defendant.

6. CONTRIBUTORY NEGLIGENCE.—Although the plaintiff's intestate was guilty of contributory negligence, the defendant is liable if the fireman in charge of the engine could, by *reasonable diligence*, have dis-

94	368
95	615
94	368
104	718
94	368
106	863
94	368
118	273
94	368
120	249
94	368
134	608
94	368
138	199

## Louisville and Nashville Railroad Company v. Earl's Adm'r.

covered his danger in time to avert the injury. To authorize a recovery, it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him.

7. **LIMITING TIME FOR ARGUMENT.**—The court did not abuse its discretion in limiting the time of counsel in their argument to twenty-five minutes, there being comparatively little conflict of testimony, and the instructions being unusually simple and direct.
8. **EXCESSIVE DAMAGES.**—A verdict for \$4,000 for the "pain, anguish, loss of time," etc., suffered by the plaintiff's intestate during the ten days he lived after the accident was not excessive.

## LEWIS McQUOWN FOR APPELLANT.

1. The court should have given the peremptory instruction asked by defendant, as the evidence showed contributory negligence.

The brakeman is bound to exercise proper care, and can not claim indemnity for an injury resulting to him which might have been prevented if he had used reasonable vigilance. (3 Woods Railway Law, secs. 370-378; L. & N. R. Co. v. Coniff's Adm'r, 90 Ky., 560.)

An employee who voluntarily places himself in a dangerous position is guilty of such contributory negligence that he can not recover. (Balt. & Pat. R. Co. v. Jones, 95 U. S., 439; Doggett v. Illinois R. Co., 34 Iowa, 284; Lewis v. Balt. R. Co., 88 Md., 588; Bailey v. Cincinnati, &c., R. Co., 14 Ky. Law Rep., 226.)

2. There was a failure to show willful neglect on the part of defendant, and for that reason also the peremptory instruction should have been given. (L. & N. R. Co. v. Coniff's Adm'r, 90 Ky., 560.)
3. The court erred in defining gross negligence when a recovery was not authorized by proof of gross negligence. The statute embraces only willful neglect, which "signifies a reckless indifference to or intentional disregard of the safety of others." (Cincinnati, etc., R. Co. v. Privitt's Adm'r, 92 Ky., 228.)
4. The court by the modification of instruction No. 9 in effect made appellant responsible for the failure of the fireman to *discover* Earl's danger in time to save, whereas the law in such cases only required the fireman, if *aware* of his peril, to use care to avoid the injury. (Illinois Cent. R. Co. v. Dick, 91 Ky., 434.)
5. It was error to allow the witness Brashear to testify as to Earl's declaration as to the cause of the injury, as it was not a part of the *res gesta*.
6. While the argument of a case may be *reasonably* limited, the court has no power to so limit it as to make the right a mockery. (Williams v. Commonwealth, 82 Ky., 641.)
7. The damages were assessed by the court and not the jury, and for that reason appellant is entitled to a reversal. (Brown v. Morris, 8 Bush, 81.)

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Louisville and Nashville Railroad Company v. Earl's Adm'r.

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J. C. POSTON, J. J. STAMP AND J. P. HOBSON FOR APPELLEE.

1. The man in charge of the engine, though nominally a fireman, was for the time the engineer of the train, and the company is responsible for the injury of a brakeman from his neglect. (*L. & N. R. Co. v. Brooks' Adm'r*, 83 Ky., 129; *L. & N. R. Co. v. Moore*, 83 Ky., 684.)
2. It was the duty of the company to have its premises in reasonably safe condition, and it is responsible to employes for injuries received from objects left too close to the track. (*Shearman & Redfield on Negligence*, secs. 194, 198-201, 205.)
3. Plaintiff had the right to presume that the premises were in proper condition and to proceed with his duties in the usual manner until he learned to the contrary.

If he was hurt while using ordinary care in so doing, the loss must fall on the party in fault. (*C. & T. R. Co. v. Russell*, (91 Ill., 298), 88 Am. Rep., 54; *St. Louis, etc., R. Co. v. Irwin*, (87 Kan., 701), 1 Am. St. Rep., 286; *Illinois Cent. R. Co. v. Welsh*, (52 Ill., 183), 4 Am. Rep., 593; *Louisville, etc., R. Co. v. Wright*, (115 Ind., 378), 7 Am. St. Rep., 432; *Anderson v. Bennett*, (16 Oregon, 515), 8 Am. St. Rep., 811; *Scanlan v. Boston, etc., R. Co.*, (147 Mass., 484), 9 Am. St. Rep., 733; *Kansas R. Co. v. Kier*, (41 Kansas, 661), 13 Am. St. Rep., 811, and cases cited.)
4. Even if Earl, when placed in peril by defendant's negligence, with only a few seconds to decide what to do, failed to exercise the best judgment for his safety, he can not be denied relief on that account. (*Shearman & Redfield on Negligence*, sec. 89.)
5. The instructions clearly presented the law of the case, and are in substance the same as those approved in *N. N. & M. V. Co. v. Dentzel's Adm'r*, 91 Ky., 42.
6. The verdict for \$4,000 was not excessive. (*L. & N. R. Co. v. Sheets*, 11 Ky. Law Rep., 781; *L. & N. R. Co. v. Mitchell*, 10 Ky. Law Rep., 211; *K. C. R. Co. v. Ryle*, 13 Ky. Law Rep., 862; *L. & N. R. Co. v. Moore*, 83 Ky., 675; *M. & L. R. Co. v. Herrick*, 13 Bush, 127; *Lawson's Rights and Remedies*, sec. 1221.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The first paragraph of the appellee's petition sought damages of the appellant company, by reason of its gross and willful neglect in crushing her intestate husband between two of its cars, and causing him great pain, anguish, loss of time, &c. The second sought damages for the loss of his life, caused by the willful

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neglect of the appellant. Being required to elect, she proceeded on the cause of action set up in the first paragraph, and obtained a verdict for four thousand dollars. The court regarded this as excessive, and required her to take judgment for two thousand five hundred dollars, otherwise, as announced, a new trial would be granted. Accordingly judgment for the latter sum was entered. Both parties complain, and it is evident that if the company were entitled to a new trial, it should have been granted without the imposition of any terms. If not, the appellee should have had her judgment in pursuance of the jury finding. In any event, the judgment for two thousand five hundred dollars is erroneous, and must be reversed. (See *Brown v. Morris*, 3 Bush, 82.) The question then is, shall the appellee have judgment in conformity with the verdict of the jury, or shall the appellant have a new trial?

The solution of the question depends on whether or not there were errors committed on the trial of the cause to the prejudice of the company. If yea, then a new trial must be ordered; if nay, judgment for four thousand dollars must be entered.

From the testimony it appears that Earl was a brakeman in the service of the company. When the train reached Munfordville moving north, the engineer turned over the engine to the fireman. The conductor was also off the train. It was a freight train, and some switching had to be done. Earl got off the cars at Logston's store, some eighty yards from the switch; the engine moved north with some box cars attached, towards and over the switch. There

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a box car was "kicked in" on the siding. Some four or five minutes are saved by this process of "kicking in," and the conductor proves that they were in a hurry. After this the engine backed to where Earl stood, who coupled it to the "dead" cars, when, on Earl's signal, it again started north "pretty fast." Earl, as was the usual custom, caught up with rear car and was riding on the ladder on the side, intending to get off at the switch where other switching was to be done. But the "kicked in" car had not been rolled back far enough on the side track to allow a man's body to pass between it and the moving cars. This close proximity was noticed by the fireman—the acting engineer—on backing down a few moments before; and he testifies that he slowed up to see if his cab would pass. Earl knew nothing of this, and when he noticed it as he rode rapidly toward it, he could neither let go nor reach the top of the car. He tried the latter means of escaping the danger, but was caught and badly crushed. He lived ten days in torture and died. The plaintiff's evidence was to the effect that Earl took no part whatever, by signals or otherwise, in placing or locating the "kicked in" car, and while he might have seen its dangerous position if his attention had been attracted in that direction, he was engaged in the work of coupling the live to the dead cars, and then in watching the ladder he was reaching for, and could not have observed the danger.

It is insisted in the first place that the defendant was entitled to a peremptory instruction because of the negligence of the deceased, but we fail to perceive

wherein he was negligent. The custom of brakemen riding on the ladder from one point of work to another was clearly established. This was the well-known way of doing such work as was before Earl on this occasion. It was inexcusable negligence to leave the "kicked in" car so close to the main track that the engineer's cab could barely pass it. This negligence caused the injury, and Earl is shown in no way to have contributed in thus locating this car. The fireman slowed up to insure the safe passage of himself, but unfortunately failed to observe similar care for the safety of others.

Secondly, it is urged that incompetent evidence was permitted to go to the jury prejudicial to the company.

Immediately after Earl fell from the ladder the conductor testified that he (Earl) said to him that "he had tried to get to the top of the car, but it caught him before he could do so." Brashear was then recalled for the plaintiff, and proved that he was present all the time after Earl fell, and there was no such talk, but that Earl did say that the accident was caused by the fool fireman, &c. What Earl said as to how the injury occurred was first asked for and brought out by the company; and as all the talk took place within a few seconds, it was evidently the same conversation, and if part was detailed all should be. Moreover, the expressions were immediately upon the heels of the occurrence—within a few seconds of it—and can fairly be said to form a part of the transaction.

Thirdly, the instructions are complained of because No. 1 authorizes a recovery from the evidence, and

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not from the preponderance; but in No. 8 the jury were told that, "before plaintiff can recover in the case, it is her duty to establish by the preponderance of the evidence that the employes of the defendant were guilty of willful or gross neglect. Ordinary neglect will not authorize a recovery."

It is said that No. 2 "assumes loss of time, pain and suffering, and then authorizes the jury to give punitive damages 'if the negligence was willful.'" It is well settled that an uncontradicted fact may properly be assumed in an instruction, and the deceased confessedly did suffer as indicated. To the extent that the right of recovering punitive damages was based on the establishment of willful neglect, the instruction was too favorable to the defendant. It required the greatest degree of negligence when only gross negligence was sufficient to warrant the finding of such damages. (See L. & N. R. Co. v. Mitchell, 87 Ky., 332; L. & N. R. Co. v. McCoy, 81 Ky., 411.)

Instruction No. 9 required the jury to find for the defendant, if they believed that Earl, in the performance of his duty as brakeman, failed to properly set the car on the side track, and left it so as to injure him in the further discharge of his duty, "unless they further believe that the fireman in charge of the engine could, by reasonable diligence, have discovered his danger, and by the use of reasonable diligence averted the injury." It is urged that the fireman owed no duty to Earl if guilty of contributory negligence, unless he *became aware* of the danger to him, and then, by the exercise of care, could

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Louisville and Nashville Railroad Company v. Earl's Adm'r.

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have averted the injury. But in *L. & N. R. Co. v. McCoy*, *supra*, it is said: "We do not understand the law to be that the party charged with gross neglect is relieved from responsibility in every case by the contributory negligence of the injured party unless he *had actual notice* of the injured party's fault in time to protect him. If the appellee, by his own negligence, contributed to such an extent to produce the injury to himself, that but for his negligence it would not have happened, then he has no cause of action, unless the appellant's agents in managing and coupling the train knew, or could have known, by ordinary attention, of the peril in which appellee's negligence had placed him, and failed to observe reasonable care to avoid the injury which followed."

This is substantially the instruction complained of. In No. 7 the jury had been told that if they "shall believe from the evidence that Earl negligently and carelessly undertook to ride on the side of the car at the time he was injured, and by the use of ordinary care and diligence he could have discovered his danger in time to arrest the injury, then the law is for the defendant, and the jury should so find."

Taking the instructions together, the modification of No. 9 referred to the danger to Earl in his placing the car on the side track. That was the subject matter of the instruction, and the concluding clause referred to that danger, and not to the peril Earl may have placed himself in by riding on the ladder, but if otherwise the instruction was right. In switching and handling cars the fireman must be diligent and wide awake to dangers in the rear as well as in



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Louisville and Nashville Railroad Company v. Earl's Adm'r.

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front. Indeed, the only danger to life was in the rear where the men were engaged in their hazardous work. If Brashear is to be believed, the slightest attention on the fireman's part to the frantic appeals and signals of himself and Earl to stop the train would have given Earl time to have reached the top of the car. A moment more and he would have escaped. The fireman says he saw nothing of these signals, but the other witness swears that he made them in plain view of him, and when his eyes were turned toward him.

Lastly, it is urged that the court erred in limiting the time of counsel in their argument to twenty-five minutes. It will be observed that while there are some twelve witnesses in the case, there is comparatively little conflict of testimony. The instructions are unusually simple and direct, and we do not think the court abused its discretion in this regard. Nor do we think the verdict excessive.

On the appeal of the company the judgment is affirmed, but reversed on the cross-appeal, and remanded with directions to enter judgment for four thousand dollars in conformity with the verdict of the jury.

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Board of Trustees of Elizabethtown v. Chesapeake, &c., Railroad Co.

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CASE 66—PETITION ORDINARY—MAY 23.

## Board of Trustees of Elizabethtown v. Chesapeake, &c., Railroad Company.

APPEAL FROM HARDIN CIRCUIT COURT.

1. **PURCHASE BY ONE CORPORATION OF PROPERTY OF ANOTHER—LIABILITY FOR DEBTS OF VENDOR.**—Where one corporation purchases under legislative authority the property and franchises of another, it holds the property free from the claims of creditors of the vendor as if it had been an individual transaction.
2. **SAME.**—Where a town made a subscription to the capital stock of a railroad corporation in consideration of the company building its machine shops in the town, a subsequent purchaser of the property and franchises of the corporation did not become bound to continue the machine shops in the town, and having removed them the town has no cause of action against it therefor. And even if the town had a lien upon the property of the original corporation to secure performance of its contract, it waived its lien by allowing the property to be sold under judgment of court without asserting its lien.
3. **THE FAILURE OF THE PURCHASER TO COMPLY WITH A PROVISION OF ITS CHARTER** requiring it to continue certain trains run by the vendor does not give a right of action to the town for damages on that account. For a violation of that statute the Commonwealth alone can maintain an action.

**S. H. BUSH, H. T. KENDALL, W. P. D. BUSH AND J. H. VAN-METER FOR APPELLANTS.**

1. While it may be true that a purchaser of a railroad at a decretal sale takes it freed from the indebtedness of the former company unsecured by mortgage, and free from mere personal obligations, yet this is not an indebtedness of the former company, but a claim for unliquidated damages for an injury inflicted by the present company by the violation of a contract which is not of a mere personal nature, but one of graver dignity, and equal, if not superior, to any contract the company could have made, since it brings into existence the very creature itself and fixes the place of its existence by virtue of its fundamental law. (*L. & N. R. Co. v. Zaring*, 9 Ky. Law Rep., 107; *Edinburg & Glasgow R. Co. v. Campbell*, 9 L. T. N. S., 157; *Fisher's Digest*, vol. 7, p. 11806; *Wilson v. Northampton, etc., Junction Co.*, 48 L. J. Chan., 508.)

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Board of Trustees of Elizabethtown v. Chesapeake, &c., Railroad Co.

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2. To the express condition that the company should locate the road and build a shop in the town, the law adds the condition that the road and shop are to be kept up and operated. (*L. & N. R. Co. v. Covington*, 2 Bush, 530.)
8. Appellant should be permitted to prove by parol that the true consideration was the agreement of the railroad company to permanently operate and maintain the road and shop in the town, as it alleges, and the appellee admits on demurrer. (*Louisville, etc., R. Co. v. Neafus, etc.*, 13 Ky. Law Rep., 951.)
4. An agreement between an individual and a railroad company for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, is valid, if made without any restriction or prohibition against any other location, and without any stipulation that the company should deflect from its intended route; and a company may bind itself to maintain perpetually a depot at a particular place. (*International & G. N. R. Co. v. Dawson*, 62 Texas, 260.)

**HOLMES CUMMINS FOR APPELLEE.**

1. A railroad company, with power to purchase the franchises and property of an older company previously sold under a mortgage, as well as to construct and operate other lines of roads, is not by virtue of such purchase an assignee of the older company so as to be bound by any of its contracts, except such as are a lien upon or otherwise bind the franchises and property thus purchased. (*C., O. & S. W. R. Co. v. Griest*, 85 Ky., 619; *Railroad Company v. Newell*, 38 Am. & Eng. Railway Cases, 503; *Smith v. Gower*, 2 Duv., 17; *City of Menasha v. Milwaukee, &c.*, R. Co., 52 Wis., 414; s. c., 5 Am. & Eng. R'y Cases, 300; *Houston & T. C. R. Co. v. Shirley*, 54 Texas, 125; s. c., 4 Am. & Eng. R'y Cases, 443; *Branson v. Oregonian R'y Co.*, 16 Am. & Eng. R'y Cases, 517.)
2. The purchasers of a railroad under a decree of foreclosure who reorganize and form a new corporation are not liable upon any of the debts, obligations or contracts of the old company. (*Vilas v. Milwaukee, &c.*, R. Co., 17 Wis., 497; *Wright v. Milwaukee, &c.*, R. Co., 25 Wis., 65; *Gilham v. Sheboygan, &c.*, R. Co., 37 Wis., 317; *Smith v. Chicago, &c.*, R. Co., 18 Wis., 17; *Steward's Appeal*, 72 Pa. St., 291; *Hopkins v. St. Paul, &c.*, R. Co., 2 Dill., 306; *Socomble v. Milwaukee, &c.*, R. Co., 2 Dill., 469; *Sullivan v. Portland, &c.*, R. Co., 94 U. S., 86; *Cook v. Detroit, &c.*, R. Co., 48 Mich., 48; s. c., 9 Am. & Eng. R'y Cases, 443; *Cooper v. Corbin*, 105 Ill.; s. c., 13 Am. & Eng. R. Cases, 395.)
3. Public carriers should be left free to act about location of shops and depots according as the public interest may require, changing from time to time as that interest may change, and the words "establish"

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and "maintain" in that connection are never construed into a contract in perpetuity. (*Railroad Co. v. Marshall*, 136 U. S., 393; *Berryman v. Trustees of Cincinnati Southern R. Co.*, 14 Bush, 755; *Corporation of Nodowassaga v. Railroad Co.*, 16 Ontario Appeal Rep., 52, and notes thereto in 38 Am. & Eng. R. Cases, 711; *Railroad Co. v. People*, 42 Am. & Eng. R. Cases, 671, and notes.)

4. On plaintiff's statement its lien, if any it had, has been lost by its own laches in standing by without protest while the admitted sales were being made. (*Moseley v. Garnett*, 1 J. J. M., 216; *Bridge Co. v. Douglass*, 12 Bush, 717.)
5. The alleged duty to run through trains from Paducah to Elizabethtown was imposed by the Commonwealth for public benefit and breach of that duty can not give right of action to any but that public—the Commonwealth. (2 *Blackstone's Comm.*, 219; 1 *Sutherland on Damages*, 6.)

P. H. DARBY OF COUNSEL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1867 the Elizabethtown and Paducah Railroad Company was incorporated, with power to construct and operate a railroad between those places; and the board of trustees of Elizabethtown, having first submitted the proposition to voters thereof, made, on behalf of the town, a subscription of seventy-five thousand dollars to capital stock of the company, upon condition of the road being constructed, and also that *the company build machine shops in Elizabethtown, and if it failed to do so the subscription to be void.*

Subsequently the subscription of stock was paid, the road constructed and machine shops built within limits of Elizabethtown, upon thirty acres of land purchased by the company.

In 1874 the Elizabethtown and Paducah railroad and all its property, real and personal, used in operating it, together with franchises of the company,

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was sold under judgment of court, Smithers & Marcus becoming purchasers and receiving a deed therefor. And afterward, they being principal stockholders, a company was incorporated to own and operate the road under name of the Paducah and Elizabethtown Railroad Company. But in 1882, appellee, the Chesapeake, Ohio and Southwestern Railroad Company, was, by act of the General Assembly, incorporated, and under authority given to it, purchased of the Paducah and Elizabethtown Railroad Company, having authority to sell, said road and all property, real and personal, connected with and used in operating it, as well as franchises of the vendor.

The Chesapeake, Ohio and Southwestern Railroad Company continued, after its purchase, to operate and maintain the machine shops in Elizabethtown, being the only shops owned or used on that road, until the — day of — 188—, when they were dismantled, and shops, instead of them, were, for consideration of fifty thousand dollars paid by the city of Paducah, erected at that place, where the machinery was taken, and all needed work of the company for which machine shops are adapted and used has since been done. And on account of that abandonment and disuse of the shops at Elizabethtown, alleged to be breach of the contract of subscription of the seventy-five thousand dollars, appellants, trustees of Elizabethtown, brought this action for damages.

In an amended petition, the failure of appellee to run through daily trains between Elizabethtown and Paducah, is made also a cause of action. Though appellee's motion to strike out that part of the amended petition

containing the additional cause of action was overruled, a general demurrer was sustained to it as well as the original petition, and the action was dismissed.

The principles by which the question of appellee's liability for abandoning and disusing the work-shops at Elizabethtown is to be mainly determined, are stated and settled in *Chesapeake, Ohio and Southwestern Railroad Company v. Griest*, 85 Ky., 619. In that case the appellee sought to recover of the appellant, Chesapeake, Ohio and Southwestern Railroad Company, for a personal injury inflicted in 1881, before its purchase of the road, and while owned and operated by the Paducah and Elizabethtown Railroad Company. The latter company was also made a defendant, but was not served with process. It is true the cause of action there was a tort, for which the Paducah and Elizabethtown Railroad Company was directly and alone liable, while here the alleged cause of action is a breach of contract made with the original company, though not alleged to have been broken by either it or the Paducah and Elizabethtown Company, but by the Chesapeake, Ohio and Southwestern Company. Nevertheless, it was in that case held, as the record in this requires us now to hold, that the last named company was a *bona fide* purchaser, paying full value for the road, and, in virtue of the deed of conveyance, became distinct and sole owner of all the property and rights of its vendor, yet free of all claims of creditors. It was further held in that case to be a settled principle that where the power to sell is, by terms of its charter, given to one corporation, a purchaser for value, though also a

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corporation, holds the property as if it had been an individual transaction.

The attitude of the plaintiff in this case is, however, not that of a creditor of the original corporation; but Elizabethtown became, upon performance of the conditions of its subscription of seventy-five thousand dollars, invested with all the rights and bound by all obligations attaching to the position of stockholder of that company. It may be that Elizabethtown, though a stockholder, would have had a right to reparation for violation by the original company of the conditions upon which the subscription of stock was made. But neither by law nor the contract of subscription was a lien acquired on the corporate property to secure performance of those conditions to the prejudice of creditors or *bona fide* purchasers; and even if such lien had existed, the failure to assert it when the action was brought by creditors of the original company for sale of its property, would amount to a waiver of it; for it is a reasonable presumption that neither the purchasers at the judicial sale nor the Chesapeake, Ohio and Southwestern Company would have paid as much for the property if it had been then adjudged a lien existed in favor of Elizabethtown for enforcement of the condition of its subscription of stock.

But it seems to us very clear that no obligation was ever imposed upon appellee, by either the act authorizing it to purchase the property, or by its contract of purchase, to continue indefinitely, or for any length of time, use of machine shops at Elizabethtown. According to the terms prescribed, there was a literal

performance of the conditions upon which the subscription of stock was made on behalf of Elizabethtown when the machine shops were built there. And in the absence of language showing, or from which it can be fairly implied, it was intended for the machine shops to permanently remain and be operated there without regard to public convenience and necessity. certainly an action brought more than fifteen years after the transaction should not be maintained against a *bona fide* purchaser of the property, either for damages or other relief, upon the ground the machine shops have been disused at that place.

In 1867, when the subscription of stock was made, Elizabethtown and Paducah were intended to be terminal points of the railroad, to construct which the stock was subscribed.

In 1882, fifteen years thereafter, that road became part of a line owned by appellee, extending from Memphis, by way of Paducah, to Louisville, and by which Elizabethtown was connected by only a branch road. So that the transfer of machine shops to Paducah, not necessary in 1867, became subsequently a matter of convenience and necessity to the public as well as appellee. And as we are unable to see wherein any legal right of Elizabethtown has been violated by such transfer, or upon what principle of equity appellee's property can be now taken or subjected to a lien of that town that never, in fact, existed, or if it existed has been waived and lost, the demurrer to the original petition was properly sustained.

2. Section 6 of "An act to incorporate the Chesapeake, Ohio and Southwestern Railroad Company,"



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approved January 19, 1892, contains this provision: "Provided, that if the said corporation shall, by consolidation or otherwise, acquire the Elizabethtown and Paducah Railroad, it shall not, by reason of any branch that may be built, or otherwise, discontinue the operation of said line from Memphis to Paducah, or from Paducah to Elizabethtown, but through cars shall be kept on the road from Memphis to Paducah and from Paducah to Elizabethtown."

Appellant did not acquire, by terms of its subscription of seventy-five thousand dollars, the right to maintain against appellee an action for failure to comply with requirement of that section. For a disregard or violation of that statute it seems to us the Commonwealth only, can maintain a proceeding or action. The demurrer to the amended petition was likewise properly overruled.

Judgment affirmed.

CASE 67—PETITION EQUITY—MAY 23.

Pendergest, &c., v. Heekin, &c.

APPEAL FROM PENDLETON CIRCUIT COURT.

1. HOMESTEAD.—A debtor may, by will as well as deed, invest his wife or child with title to his homestead free from the claims of his creditors.
2. SAME.—A debtor residing with his family on land devised to him is entitled to a homestead therein against debts created prior as well as debts created subsequent to the time he acquired title.

In this case a widow with a family is held to be entitled to a homestead in land devised to her by the husband, as against debts created by her after the death of the testator.

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3. AN APPEAL LIES from a judgment dissolving an injunction where it is rendered on final hearing, and as part of a judgment dismissing the petition.

JOHN H. BARKER FOR APPELLANTS.

1. Appellants are entitled to the homestead exemption. (*Allensworth v. Kimbrough*, 79 Ky., 332; *Myers' Guardian v. Myers' Adm'r*, 89 Ky., 442.)
2. Injunction was the proper remedy. (High on Injunctions, secs. 147-269; Willard on Injunctions, secs. 125, 126.)

J. T. SIMON FOR APPELLEES.

1. An order dissolving an injunction is not a final order and can not be appealed from. (Civil Code, secs. 296, 297; *Rodman v. Forline*, 2 Met., 325.)
2. No notice was given the appellees of the application for the injunction, and the injunction was improperly issued. (Civil Code, sec. 276.)
3. The facts alleged are not sufficient to authorize an injunction. Appellants have their remedy at law. (High on Injunctions, secs. 367, 368; *Grant v. Simrall*, 79 Ky., 438; *Nesmieth v. Bowler*, 8 Bibb., 487.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

John A. Pendergest died testate. By the terms of his will his wife gets all his property during life or widowhood, remainder to his son; but in case he should die before his mother, and without issue, then she gets the estate absolutely. The testator's estate devised consisted of a house and lot in the town of Falmouth, not worth exceeding one thousand dollars. After the death of the testator the widow contracted some debts to the appellees Heekin & Hill, upon which they obtained judgment in the Pendleton Circuit Court. Executions were obtained thereon, and levied upon the house and lot devised. This suit was brought to set aside the levies, and an injunction to prevent the sale until the court could act was obtained. The executions were levied upon the idea that the

debts were created by the testator in his life-time, and that the property (his homestead) could be sold subject to the homestead right of the widow and infant children therein; for the debts were not debts due by the testator. Now, according to the decision of this court (see *Myers' Guardian v. Myers' Administrator*, 89 Ky., 442) a testator may will his homestead and invest the devisee, though such devisee may be his wife or child, with the title the same as he could do by deed. In such case if the real estate devised is not worth more than one thousand dollars, and if he has a family, the devisee is entitled to a homestead under the provisions of the General Statutes, and if it takes the property devised to make it, it is not subject to his debts made prior thereto, because property acquired by descent or will is not subject to the prior debts of devisee to the extent of a homestead therein, nor is it subject to the debts of the devisee created after the property was thus acquired. In this case the widow is entitled to a homestead in said property, she having a family.

It is, however, urged that as there was a motion to dissolve the injunction, and as it was dissolved, the appellant's remedy was to apply to have the injunction reinstated, and the remedy can not be reached by appeal. But the facts stated in the petition and amended petition show that the appellants were entitled to have the levy of the executions upon the house and lot quashed, which the court ought to have done; but, instead, it dismissed the petition, and both the dismissal and the dissolution occur in the same judg-

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Hessey, &c., v. Hessey.

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ment; and as the dismissal of the petition is a final judgment and appealable, and as the order of dissolution occurs by the same judgment, the proper remedy is to appeal the whole case. Sections 296 and 297 of the Civil Code, that provide for an application to one of the judges of this court to reinstate an injunction that is dissolved upon motion, apply to the dissolution of injunctions upon motion in advance of the rendition of a final judgment in the case. In such case no appeal can be taken from the order of dissolution, because no final judgment has been rendered. Hence the remedy is by motion to reinstate; but if the injunction is dissolved upon rendering the final judgment in the case, then the remedy is by an appeal of the whole case. But, as said, the court should have quashed the levies of the executions upon the house and lot, and the case is reversed, with directions to quash said levies.

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CASE 68—PETITION EQUITY—MAY 25.

Hessey, &c., v. Hessey.

APPEAL FROM NELSON CIRCUIT COURT.

**PARTITION—ESTOPPEL BY VERBAL AGREEMENT.**—A widow verbally agreed with two of her three children (a son and daughter) that if they would convey to the third child their interest in a tract of land left by their father they should jointly occupy and use with her, and at her death have, the whole of the "home place," which was owned jointly by her and their father, she owning an undivided third. The two children conveyed accordingly and occupied the home place jointly with their mother for many years, and until the daughter married, when the son found

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another home. In this action by the mother for a partition of the home tract, and the allotment of one-third to her and one-third each to the son and daughter, the chancellor adjudged a division into two parts—one to be allotted to the son and one to the daughter, the son being required to pay annually such a reasonable sum for the support of his mother as will be sufficient for that purpose when added to what the daughter should contribute. *Held*—That the judgment is, under all the circumstances, just and equitable. The mother can not claim one-third of the land absolutely, the agreement by her with her children, although verbal, being an effectual estoppel against her; and being too old to manage any part of the land, the allotment of one-third to her for life would be of no benefit to her.

## GEO. S. FULTON FOR APPELLANT.

A verbal agreement for the division of land is void. (*White, &c., v. O'Bannon*, 9 Ky. Law Rep., 384; *Duncan v. Duncan*, 13 Ky. Law Rep., 918.)

## JOHN S. KELLEY FOR APPELLEE.

This is not the case of a mere parol division of lands, but the appellee was induced by the representations of the parties now complaining, to convey a valuable interest for the benefit of his sister, Mrs. McGee, and they stood by and saw Mrs. McGee convey to him an undivided one-third interest of one-ninth in consideration of his joining in the deed to her vendee.

But even where a partition is by parol or is illegal and informal, if acquiesced in for a long time, or improvements made, the courts will recognize it as valid. (*Parker v. Anderson*, 5 Mon., 450; *Pringle v. Sturgeon*, Litt. Sel. Cases, 113.)

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1848, Abraham Hessey died in Nelson county, owner of seventy-eight acres of land on Cox's creek, and an undivided third of a tract of one hundred and seventy-one acres whereon he then resided. He had contracted for another third of that tract, which was, after his death, paid for with proceeds of his estate. His widow, Mary Hessey, owned, by inheritance, the remaining third of that tract, and was, after her husband's death, allotted dower in the Cox's creek land.

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Hessey, &c., v. Hessey.

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Abraham Hessey left three children by Mary, all infants, viz. : William B., Elizabeth and Precious.

In 1874 Elizabeth married — McGee, and at the request of the mother, Mary, the other two children, William B. and Precious, conveyed to Elizabeth McGee, or her vendee, the tract of seventy-eight acres on Cox's creek, in consideration of her conveyance to them of her undivided third interest in the home tract of one hundred and seventy-one acres. It is not disputed, but admitted by parties to this action, that William B. and Precious Hessey were induced to make the conveyance to the vendee of Elizabeth McGee, by the request and verbal agreement of their mother that they were to have the whole of the home tract of one hundred and seventy-one acres; and they both have testified they would not have parted with their entire interest in the Cox's creek land, worth about, or perhaps a little more than, one-third of the home tract, but for the agreement of their mother for them to jointly occupy and use, and at her death to have, the whole of the home place, including her undivided third, which was necessary in order to make their respective shares equal to what Elizabeth McGee had gotten in the manner mentioned.

That the arrangement might be carried out, the mother, Mary, relinquished her dower interest in the Cox's creek land, and thereafter she was supported and resided on the home place, which was jointly occupied, used and claimed by William B. and Precious without dispute or contention, until 1888, when Precious married Barton Snyder. During that period

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William B. and Precious had, with money accumulated by their own efforts, purchased jointly two or three small tracts adjoining the home place; and he had built and occupied a dwelling-house on another part of the land, the mother and Precious continuing to reside at the old homestead. There was, in 1888, after Precious married, a division made by commissioners of the home tract and the three small tracts into two parts, one of which, including his dwelling-house, was allotted to William, and the other, whereon was the homestead, was allotted to Precious. But although both Precious and her mother had agreed to make the division, and commissioners had been agreed upon for the purpose, who, as appears, made an apparently fair and just division, they, for some reason not satisfactorily explained, refused to abide by it, though the two lots were thereafter separately occupied and cultivated until this action was brought in 1891.

The purpose of the action instituted by Mary Hessey, the mother, Precious Snyder and her husband, Barton Snyder, against William B. Hessey, is to have the home tract of one hundred and seventy-one acres divided into three parts—one to be set apart and conveyed absolutely to Mary Hessey, and the other two to William B. and Precious respectively. The lower court, however, refused prayer of the petition, and, instead, adjudged a division into two parts, one to be allotted to William B. and the other to Precious Snyder, but the former is required to pay annually for support of his mother a sum fixed by the commissioners, who attempted to make a division in 1888.

## Bowlin v. Commonwealth.

which sum appears to be reasonable and sufficient, when added to what Precious Snyder should contribute, to comfortably support her.

It seems to us the judgment rendered is the only one a chancellor could, under the circumstances, render, that would be just and equitable under all the circumstances. For it is evident an allotment of one-third to the mother, who is too old to manage it successfully, would be of no benefit to her; and to allot one-third to her absolutely would be unjust to William B. For although the agreement of his mother upon faith of which he parted with his interest in the Cox's creek land in 1874, was verbal, we think it should be treated as an effectual estoppel as against his mother. Besides, she admits, in her testimony as a witness, the agreement was made, and makes it very clear she does not even now wish to violate it, or deprive William B. of ultimate acquisition of one entire half of the home place.

Judgment affirmed.

## CASE 69—INDICTMENT—MAY 25.

## Bowlin v. Commonwealth.

## APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. HOMICIDE—CONTINUANCE.—Upon the trial of appellant for murder he was entitled to a continuance on account of the absence of a witness, who, if present, would have testified that the deceased, just before the killing, advanced rapidly toward defendant with an angry look, having his hand in his pocket, and when he came up threatened to kill defendant, the affidavit for a continuance, showing that due

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diligence had been used to procure the attendance of the witness. And in view of the conflict in the testimony as to what took place immediately preceding the killing, the error in refusing a continuance was prejudicial.

2. **SAME.**—Defendant was also entitled to a continuance on account of the absence of witnesses whose attendance he had used due diligence to procure, and who, if present, would have testified that deceased had offered to hire one of them to kill defendant, and also that deceased had purchased a rifle for the purpose, as stated by him, of killing defendant.
3. **INSTRUCTION AS TO MANSLAUGHTER.**—Upon a trial for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis, as it is not the province of the court to weigh evidence for the purpose of determining whether the defendant is entitled to such an instruction.

**TYLER & APPERSON AND J. COLEMAN REID FOR APPELLANT.**

1. The court erred in refusing a continuance. (*White v. Commonwealth*, 80 Ky., 488; *Petty v. Commonwealth*, 12 Ky. Law Rep., 920.)
2. The failure of the court to give an instruction as to manslaughter was error. (*Trimble v. Commonwealth*, 78 Ky., 176; *Cook v. Commonwealth*, 10 Ky. Law Rep., 222; *Cottrell v. Commonwealth*, 18 Ky. Law Rep., 306; *Lewis v. Commonwealth*, 14 Ky. Law Rep., 211; *Campbell v. Commonwealth*, 88 Ky., 408.)
3. The court should have given instruction asked by appellant as to previous threats, lying in wait, etc. (*Oder v. Commonwealth*, 80 Ky., 82; *Bohannon v. Commonwealth*, 8 Bush, 448.)

**W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

Brief not in record.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

Henry Bowlin, having been indicted for murder of Henry C. Brown, convicted and sentenced to death, appeals.

According to testimony of witnesses of the Commonwealth, the deceased, while walking quietly along a public street in Mt. Sterling, and after he crossed from one corner of a square to another, was shot in the back of the neck and instantly killed by appel-

lant, who had followed, and when near enough to touch him shot with a pistol without warning. It further appears that a year or more before that, the two men had a quarrel and fight at a picnic in the country in vicinity of where they resided; and subsequently on occasion of a fight between deceased and a man named Wilson, appellant procured or had a gun with which there is evidence tending to show he intended and endeavored to shoot deceased.

In behalf of appellant, witnesses testified that in forenoon of the day of killing, there being a considerable number of persons assembled in Mt. Sterling to hear a political speech, deceased met appellant on a street and threatened to kill him, though he made no demonstration to then do so; and that appellant then procured a pistol, having come to town without one. According to the testimony of appellant, and of one or two other witnesses, he did not, in fact, follow deceased to the corner where the homicide occurred, but that before seeing deceased he had started diagonally across the street to a store-house on that corner, for the purpose of meeting a person there on business, and before reaching that place unexpectedly met deceased, who spoke to him, saying: "Damn you, I have got you now," or "I will kill you now," at the same time putting his hand in his pocket and advancing towards appellant. He further states he was at the time of that collision nearer to the corner mentioned than was deceased, and that deceased saw him when the shot was fired.

It was further proved by witnesses in behalf of appellant that deceased had, during several months

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prior to the killing, repeatedly threatened to kill appellant, and carried a gun apparently for that purpose. The deceased was shown to have been a much larger man than appellant, and several witnesses testified to his reputation as a quarrelsome, overbearing man.

The first ground for reversal we will consider is refusal of the court to grant a continuance of the case upon appellant's motion.

The homicide occurred near the last of October, 1892. The indictment was found during the ensuing November term, and on 29th of that month. The case was not then tried, being continued to the next term. But the next term, by reason of a change in times of holding, that court began in January, and the case was again called, 16th of that month, and set for trial on 18th of January, 1893, when it was commenced.

In appellant's affidavit for a continuance, he stated three witnesses were absent; that by the first one of them named he could prove that a short time before the killing, deceased offered to hire and pay the witness to kill appellant, and also told witness he intended to kill him. That by the second he could prove the deceased purchased a Winchester rifle for the purpose, as stated by him to witness, of killing appellant. And that the third witness would prove he was in Mt. Sterling, and saw deceased, a few moments before the killing, rapidly advance towards appellant with an angry look, having his hand in his pocket, and, when he came up, used the language already mentioned. One of those witnesses was at the time

absent from the State, though it was stated in the affidavit his attendance could be procured at the next term of court. As to the other two, it appears due diligence had been used to have them present.

It seems to us that in view of the conflict of testimony in regard to what took place, and the relative position and conduct of appellant and deceased immediately preceding the homicide, the testimony of the absent witness in regard thereto was very important. The testimony of the other two absent witnesses was also material, because it tended to show appellant was then in danger of losing his life, or suffering great bodily harm at the hands of deceased; and also because it tended to support the theory that appellant was in constant fear and dread of deceased, and that under excitement or impulse of that fear he fired the fatal shot. And that brings us to the second ground for reversal: that is, failure of the lower court to give an instruction authorizing the jury to find appellant guilty of manslaughter.

In our opinion the testimony heard on the trial was enough, independent of that of the absent witnesses, to justify and require such an instruction, and failure of the lower court to give it was an error to the prejudice of the substantial rights of appellant. In fact it is not the province of the lower court, any more than of this, to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter. But if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis.

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We perceive no other error of law in regard to instructions given and refused. But for the reasons indicated the judgment is reversed, and case remanded for a new trial consistent with this opinion. Judge Hazelrigg not sitting.

## CASE 70—PETITION EQUITY—MAY 25.

## Holzhauer v. City of Newport.

## APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **CONSTITUTIONAL LAW—LIMITATION AS TO TAX RATE.**—Section 157 of the present Constitution, limiting the tax rate of towns and cities, is not self-operative, but is addressed to the Legislature indicating the limitations on the powers it shall give the several classes of towns and cities when it shall come to provide for their classification and government by general laws; and until this is done, which must be within four years from January 1, 1891, the existing charters of towns and cities continue in force, including their tax rates and methods of raising revenue.
2. **SAME—LIMITATION AS TO INDEBTEDNESS.**—While section 158 of the present Constitution, limiting the indebtedness of towns and cities, does not require legislation to make it operative, yet by the express terms of this section the limitation of ten per centum provided for therein as to certain classes of cities may be exceeded when the proposed indebtedness was authorized under laws in force prior to the adoption of the present Constitution; and there is no limit to this excess; and, however great the amount of the existing and authorized liabilities of any town or city at the time of the adoption of the Constitution, there may be an increase of indebtedness beyond that amount to the extent of two per centum upon the value of the taxable property therein.
 

Contracts for the reconstruction of the streets of the city of Newport and for the building of sewers, as provided for by acts of the Legislature in force at the time of the adoption of the present Constitution, may lawfully be made, however great the existing indebtedness of the city, or the indebtedness thus to be created.
3. **SAME.**—Section 159 of the present Constitution, which provides that

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f103	163

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whenever any county, city, etc., "is authorized to contract an indebtedness it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest," etc., requires legislation to make it operative.

4. **SAME—UNIFORMITY OF TAXATION.**—Sections 171 and 174 of the Constitution which require uniformity of taxation according to value, announce nothing new, but are merely declaratory of what was always the law of taxation in this State, and, therefore, do not forbid local assessments to pay for the improvement of streets or the construction of sewers.

**C. L. RAISON, JR., FOR APPELLANT.**

1. Where a city is indebted to the extent of twelve per cent. of the assessed value of all the taxable property in the city, no further indebtedness except for ordinary current expenses necessary to carry on the machinery of the government of the city can be incurred until the indebtedness is reduced to ten per cent. of the assessment value of the taxable property in the city; and if it was indebted to the extent of ten per cent. at the time of the adoption of the new Constitution and has such authority under laws in force prior to the adoption of the Constitution, it may incur two per cent. additional indebtedness under these laws, under certain limitations and restrictions; that is, the debt may be created and increased from year to year until the limit of the additional two per cent. is reached, provided the debt incurred each year does not exceed the current revenue and income of the city for the year in which the debt is incurred; and if a debt is desired to be created in any one year beyond the current income and revenue for that year, it can not be done "without the assent of two-thirds of the voters thereof, voting at an election held for that purpose," as provided in section 157 of the Constitution; and any indebtedness created in violation of that section is void. (Constitution, secs. 158, 159, 157, 166, 156; *Spillman v. City of Parkersburg*, 5 Am. Railroad and Corp. Rep., 370.)

Bonds issued by a city in violation of the provisions of the Constitution as to the limit of indebtedness are void. (*Buchanan v. Litchfield*, 102 U. S., 278; *Litchfield v. Ballou*, 114 U. S., 191; *Dixon County v. Fields*, 111 U. S., 83; *Lake County v. Rollins*, 130 U. S., 669; *Scott v. Davenport*, 84 Iowa, 208; *Sutliff v. Board of County Commissioners*, 147 U. S., 280.)

2. Section 158 of the Constitution was directed to the cities and towns, and was intended to bring them at once under its operation, the Constitution itself fixing the class to which the towns and cities shall belong. (*East St. Louis v. United States ex rel Amy*, 120 U. S., 600.)

The courts will take notice of the Federal census in matters of the

## Holzhauer v. City of Newport.

population of the different towns and cities in the State at any particular date. (*McConnel v. Bowdry*, 4 Mon., 394; *Hart v. Bodley*, Hard. 98; *Coughton v. Bilbo*, 1 Mon., 140.)

3. The provisions of the Constitution limiting the tax rate of cities and towns operated directly upon all cities and towns in the State immediately upon the adoption of the Constitution. (15 Am. & Eng. Enc. of Law, p. 1123; *List v. Wheeling*, 7 W. Va., 501; *East St. Louis v. People*, 114 Ill., 655; *East St. Louis v. United States ex rel Amy*, 120 U. S., 798; *Norton v. Board of Commissioners, &c.*, 129 U. S., 479; *Scott v. Davenport*, 34 Iowa, 208.)
4. Special assessments upon abutting property to pay the cost of street improvements are a violation of the requirements of the Constitution that taxes "shall be uniform," and that property "shall be assessed for taxation at its fair cash value." (Constitution, secs. 171, 172; *City of Norfolk, et al., v. Chamberlain*, 20 Va. Law Journal, pp. 50-89; *Weeks, &c., v. Milwaukee*, 10 Wis., 258; *Hammett v. Philadelphia*, 65 Pa. St., 146; *Washington Avenue Case*, 69 Pa. St., 352; *Seely v. Pittsburgh*, 82 Pa. St., 360; *McBean v. Chandler*, 9 Heisk (Tenn.), 340; 2 Dillon on Mun. Corp., sec. 753.)

## GEORGE WASHINGTON AND ROOT &amp; ROOT FOR APPELLEE.

1. As the general laws for the government of towns and cities provided for in section 166 of the Constitution, have not yet been enacted, the city of Newport is still operating under its old charter and the amendments thereto.
2. Even conceding that section 166 is in some degree qualified by section 158 of the Constitution, it can not help the case of appellant, as the first proviso of that section expressly authorizes an indebtedness in excess of the limitation prescribed therein, "when the same has been authorized under laws in force prior to the adoption of this Constitution."

But if it be doubtful from the language used, whether the meaning is that the law in force *prior* to the adoption of the Constitution, shall, as to the indebtedness authorized by it, *remain in force*, the debates make it clear that such was the meaning. (*Debates of Const. Conv.*, vol. 2, pp. 2885 and 2886.)

The courts will look to the Debates in construing the Constitution where the language used leaves the meaning in doubt. (*Cooley's Const. Limit.*, ed. 1883, Marg., p. 66.)

3. The limitation of two per cent. referred to in the second proviso of section 158 applies solely to an indebtedness contracted subsequently to the adoption of the Constitution, under charter provisions, and independently of whatever indebtedness may have been contracted in virtue of special enactments prior to the Constitution.

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4. Sections 157 and 159 of the Constitution require future legislation to give them effect.

Courts must lean in favor of construction which will render every word operative. (Cooley's Const. Limit., marg. p. 58, ed. of 1885.)

5. Section 171 of the Constitution in requiring that taxes shall be uniform merely puts in express terms what has always heretofore been deemed a cardinal principle of taxation. (Lexington v. McQuillan's heirs, 9 Dana, 517; Pearson v. Zable, 78 Ky., 173; 8 Bush, 513; Cooley's Const. Limit., star page, 495, ed. 1883.)

Local assessments for street improvements do not violate the rule requiring uniformity. (Lexington v. McQuillan's Heirs, 9 Dana, 518; Louisville v. Hyatt, 2 B. M., 177; 78 Ky., 173; Burroughs on Taxation, pp. 459, 460; Cooley's Const. Limit. marg. p. 507; People v. Mayor, &c., of Brooklyn, p. 419; 14 Bush, 21; Maddux v. City of Newport, 12 Ky. Law Rep., 657; Palmyra v. Morton, 25 Mo., 593; Dillon on Mun. Corp., sec. 596; 8 Bush, 511; 4 N. Y., 428; Cooley's Const. Limit., top pp. 627, 628, 634, 635.)

The words "tax" and "taxation" in the Constitution do not include the idea of local assessments. (Burroughs on Taxation, pp. 461, 462; Dillon on Mun. Corp., secs. 593, 600, 617, (1 st. ed.); Cooley on Taxation, p. 456; Broadway Baptist Church v. McAtee, &c., 8 Bush, 518; Buffalo City Cemetery Case, 46 N. Y., 506; Patterson v. Society, 24 N. J., 385; Bridgeport v. New York, &c., R. Co., 36 Conn., 255; Emery v. Gas Co., 28 Cal., 345; Street Cases, 20 La. An., 497; Garrett v. St. Louis, 25 Mo., 505; Reeves v. Treasurer of Wood Co., 8 Ohio St., 333; Johnston v. Louisville, 11 Bush, 532; 13 Ky. Law Rep., 387.)

6. There is an element of fairness in local assessments for street improvements. (Municipality v. Dunn, 10 La. An., 57; Philadelphia v. Fryon, 35 Pa. St., 401, 404.)

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On June 2, 1892, the city council of the city of Newport, Kentucky, acting under and by virtue of the authority conferred on it by an act of the Legislature of Kentucky, entitled "An act to amend the charter of the city of Newport, authorizing the reconstruction of its streets, and to pay for same by an issuance of bonds of the city," approved April 24, 1890, passed a resolution providing for the reconstruction of Monmouth street, by grading, curbing, &c., and pav-



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ing same with brick. In September thereafter a contract to do the work was entered into with one Charles Spinks, in conformity with the terms and requirements of the act named, and he at once began the reconstruction of the street under his contract. About the same time the city council entered into contract with Regan and others for the construction of certain sewers in the city, as it was authorized to do under and by virtue of an act of the Legislature, entitled "An act to provide for sewerage in the city of Newport," approved April 16, 1890. The sewers were to be built as provided by the act, the issual of the bonds of the city in payment therefor, and the collection of the assessments on the real estate in the respective sewer districts were to be made as directed by the act, and these contractors were proceeding to execute their contracts.

Thereupon the appellant Holtzhauer, a citizen and tax-payer of the city, owning property on Monmouth street, and living in one of the sewer districts, brought this action seeking to enjoin the city from the further prosecution of reconstructing the streets or building the sewers, under the provisions of the acts named, contending that by the present Constitution the authority to increase the indebtedness of the city to the extent required by the work at hand had been revoked.

The facts alleged and conceded are in substance—*first*, that the city has already, and has had for years, a tax rate of one dollar and sixty-five cents on the one hundred dollars upon the value of her taxable property, not including the tax for school purposes;

that these contracts incurred an expense largely in excess of the current income and revenue of the city for the year 1892, after deducting its ordinary or necessary expenses, and that this was done without the assent of two-thirds of the voters in the city voting to determine whether or not it should be done, no vote being, in fact, taken. *Second*, That the indebtedness of the city at the time of the adoption of the present Constitution, and at the time the contracts in question were entered into, was in excess of ten per centum on the valuation of her taxable property during that time. That the *authorized* indebtedness, if added to the existing debt of the city, exceeded twelve per centum of that valuation, and that the authorized indebtedness was in excess of two per centum thereon. And *third*, that the city at no time provided for the collection of an annual tax sufficient to pay the interest on the indebtedness incurred by these contracts, or created a sinking fund for the payment of the principal thereof.

By reason of the existence of the facts grouped in our *first* enumeration, it is insisted that the proposed issual of bonds and the consequent increase of the tax rate are in violation of section 157 of the Constitution, which reads as follows:

“The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz: For all towns or cities having a population of fifteen thousand or more, one dollar and fifty cents on the hundred dollars; \* \* \* un-

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less it should be necessary to enable such city, town, county or taxing district to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this Constitution. No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

The section immediately preceding this one is the first under the general head of "Municipalities." By its direction the General Assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and by a general law provide how towns may be organized, and enact laws for the government of such towns, until the same shall be assigned to one or other of the classes named. By section 166, "all acts of incorporation of cities and towns heretofore granted, and all amendments thereto, \* \* shall continue in force under this Constitution \* \* \* until such time as the General Assembly shall provide by general laws for the government of towns and cities, and the officers and courts thereof; but not longer than four years from and after the first day of January, 1891, within which time the General Assembly shall provide by general

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laws for the government of towns and cities, and the officers and courts thereof, as provided in this Constitution."

From the very nature of the case, this last section is self-operative. It provides for the continuation of existing laws, of acts and amendatory acts of incorporation. There shall come a time, says the section, when the General Assembly shall enact general laws for the government of these towns and cities in conformity with this Constitution. In the meantime their present governmental regulations must remain in force. Their charters and amended charters must for the present suffice.

If section 157 is held to be self-operative, or the law governing towns and cities instantly upon the adoption of the Constitution, there is an irreconcilable conflict between the two sections. Two laws fixing different]rates of taxation can not both obtain at the same time in the same city.

We are required, upon every principle of construction, "to maintain, if possible, every part of the fundamental law." Effect is to be given, if possible, says Cooley, "to the whole instrument, and to every section and clause." There is, so to speak, a formative period in the government of these cities and towns. Until such time as "the General Assembly shall provide by general laws" for their government, which must be within four years from January 1, 1891, the existing laws of these incorporations—their tax-rates included, and methods of raising revenue—must continue in force, if the express letter of the Constitution is to be observed. The contraction of

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the indebtedness in question, and the consequent increase of the tax-rate, or a continuation of the same rate for a longer period, were authorized by the Legislative Acts of April, 1890. The manner of its contraction was specifically pointed out. No vote other than that taken was required. Their constitutionality, under the former organic law of the State, was tested in the cases of *Maddux v. The City of Newport*, and they are as fully in force to-day as when their constitutional validity was upheld by this court in December, 1890. (See cases, *supra*, 12 Ky. Law Rep., 657.) We are of opinion that this section was addressed to the Legislature, indicating the limitations on the powers it shall give the several classes of towns and cities when it shall come to provide for their classification and government by general laws.

The *second* group of facts enumerated above are supposed to bring the case under the prohibitory provisions of section 158 of the Constitution. So far as applicable, it is as follows:

“The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur an indebtedness \* \* in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: Cities of the first and second classes, and of the third class having a population exceeding fifteen thousand, ten per centum:  
\* \* \* *Provided*, Any city, town, taxing district or

other municipality, may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution: *And provided further*, If, at the time of the adoption of this Constitution, the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding *two per centum*, \* \* in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency, the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district, or other municipality."

It may be admitted that, to the extent that this section provides for a state of case in existence at the time of the adoption of the Constitution, it is applicable to all towns and cities resting under the conditions named. But in express terms the limitation of ten per centum may be exceeded when the proposed indebtedness "*has been authorized under*

*laws in force prior to the adoption of this Constitution.*" There is no limit indicated to this excess. From the very nature of the case there could be none. At least the actual condition of the cities and towns, with respect to the sums they owed, could not be affected by the Constitution. These debts, however large, and by whatsoever extent they might in fact exceed the conservative limit imposed under the Constitution, could not be legislated out of existence. They could not be repudiated, or the means denied whereby they could eventually be paid; and yet some restriction, some limit, may be imposed, beyond which even these cities shall not go. Therefore, if the limit already has been reached, such city may not be authorized or permitted to increase its indebtedness, existing and authorized, in an amount exceeding two per centum on the value of its taxable property. It does not matter that the existing and authorized liabilities exceed the ten per centum *and* the two per centum. This can not be prevented or remedied, but such indebtedness as may be contracted subsequently to the adoption of the Constitution, and independently of liabilities authorized to be contracted before that adoption, must not exceed the two per centum limit. The "increase of indebtedness" meant by this second proviso, is that over the aggregate indebtedness already in existence or already authorized under laws then in force. This construction necessarily determines the question at issue, and we do not think that section 159 affects the case. It provides that "whenever any county, city, town, taxing district or other municipality is

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Holzhauer v. City of Newport.

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authorized to contract an indebtedness, it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest, &c." The General Assembly, by general laws yet to be enacted, must see to the imposition of these limitations and restrictions. Future legislation is necessarily implied from the very language of the provision.

It is thought, however, that the method of assessment provided for in the acts in question is in violation of sections 171 and 174 of the Constitution. These sections require uniformity of taxation, and taxation according to value. While they were not in the former Constitution, the principles contained therein have always been recognized as the basis of all taxation. They announce nothing new, but are merely declaratory of what was always the law of taxation in this State. The method of assessment provided by these acts was held to be in accord with the old Constitution in the cases of *Maddux v. The City of Newport*, *supra*, and we adhere to that opinion.

We are of opinion that contracts for the reconstruction of the streets of Newport, and for the building of the sewers, as provided for by the acts of April, 1890, may lawfully be made; that the plans of assessment proposed are constitutional, and that there can be no question of the legal and constitutional validity of the bonds of the city issued, or to be issued, as authorized by the acts in question.

Judgment affirmed.



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Owensboro, &c., Railroad Company v. Harrison.

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CASE 71—PETITION ORDINARY—MAY 25.

**Owensboro, &c., Railroad Company v. Harrison.**

APPEAL FROM DAVIS'S CIRCUIT COURT.

1. IN THIS ACTION AGAINST A RAILROAD COMPANY TO RECOVER LAND UPON WHICH IT HAS CONSTRUCTED ITS ROAD-BED, in which the defendant claims under a conveyance from plaintiff, and plaintiff replies that defendant, against his protest, built its road-bed on other land than that conveyed, as defendant did not, until after the trial was begun, attempt to deny that against plaintiff's protest it built its road-bed on other land than that conveyed, the court did not abuse its discretion in refusing to allow the denial to be filed.
2. AN AMENDED ANSWER alleging that plaintiff acquiesced in the building by defendant of its road-bed on its line of road, must be regarded as merely a repetition of the allegation of the original answer that the road-bed was built on the land conveyed by plaintiff, and not as a plea of confession and avoidance, and, therefore, defendant can not complain of the action of the court in sustaining a demurrer to the amendment.
3. THE DEFENDANT CAN YET HAVE ITS ROAD-BED CONDEMNED AS A RIGHT OF WAY, and the court has the right to suspend the writ of possession for a reasonable time in order for it to take that proceeding if it applies for it.

**J. A. DEAN FOR APPELLANT.**

1. The amended answer pleading in avoidance of plaintiff's right to recover the land itself, the permission, consent and acquiescence of plaintiff in the building of defendant's road on his land, and the putting of same in operation, stated a good defense, and the court erred in sustaining demurrer thereto. (*Holloway v. Louisville, &c., R. Co.*, 92 Ky., 244.)
2. It should have been left to the jury to determine whether the entry and occupation were without plaintiff's consent.
3. It was put in issue whether or not at the time of the conveyance defendant's road had been definitely located along a particular route across plaintiff's land, and this question should have been submitted to the jury.

**SWEENEY, ELLIS & SWEENEY FOR APPELLEE.**

No brief in record.

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Owensboro, &c., Railroad Company v. Harrison.

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CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee conveyed to the appellant a right of way across his land for its railroad bed. The right of way was by specific boundary, that had been previously surveyed and staked off. The appellee seeks to recover the possession of the strip of ground upon which the appellant constructed its railroad bed, because, as it is alleged, the appellant, without appellee's consent and against his protest, constructed said track upon other ground than that conveyed to him. The appellant contends that it constructed its bed and track on the ground conveyed to it. The jury found that the appellant had not constructed its road-bed upon the ground conveyed to it. The court's instruction upon the subject of the construction of the road-bed is correct. The appellant did not attempt to deny that the right of way had been staked off before the conveyance was made, and that the appellant built its bed upon other land against the appellee's protest, until after the trial had begun. The court then refused to allow it to file the denial. We can not say that the court, under the circumstances, abused its discretion.

The appellant also objects to the court's action in sustaining a demurrer to its amendment that set up the plea of estoppel, consisting, as is alleged, in the fact that the appellee knew and acquiesced in the appellant's building its road-bed on its line of road. If the plea was intended as a confession and avoidance, the appellant is confronted with the fact that it had already admitted, which stood as true, that the appellant had built its road-bed against the pro-

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Louisville and Nashville Railroad Company v. Long.

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test of the appellee. But the plea, as we understand it, is not a plea of confession and avoidance. For the answer asserted that the road-bed was constructed on the ground conveyed, and the proposed amendment says that the road-bed was constructed on its line of way by appellee's consent, &c. Now, taking the answer and amended answer together, they repeat the fact that the road-bed was built on the land conveyed by the appellee. The bill of exceptions is not copied in the record.

The appellant can yet have its road-bed condemned as a right of way, and the court has the right to suspend the writ of possession for a reasonable time in order for it to take that proceeding, if it applies for it.

The judgment is affirmed.

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CASE 72—PETITION ORDINARY—MAY 27.

Louisville and Nashville Railroad Company v.  
Long.

## APPEAL FROM CARROLL CIRCUIT COURT.

1. **RAILROADS—GROSS NEGLIGENCE AS TO PASSENGER.**—The servants of a railroad company in charge of a mixed freight and passenger train were guilty of the grossest negligence in leaving the passenger car on the main track at a station without using proper care to flag an approaching freight train in time to avoid a collision.
2. **A PASSENGER WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE** in entering the passenger car of such a train without notifying the conductor, although the car was fifty feet from the platform, the rules of the company requiring persons taking passage on such trains to get on from the road-bed, or wherever the convenience of those in charge

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Louisville and Nashville Railroad Company v. Long.

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of the train required, and such being the custom of passengers. Nor does the fact that the passengers other than plaintiff were warned of the danger, and succeeded in getting out of the car before the collision, show that plaintiff was guilty of contributory negligence in not doing so.

3. **EXCESSIVE VERDICT.**—Although the case was one for punitive damages, and the plaintiff, in addition to serious external cuts and bruises, received a shock which greatly affected her entire nervous system, yet as it does not satisfactorily appear that her injuries are permanent, a verdict for \$26,000 appears to a rational mind at first blush to be excessive, and must, therefore, be set aside.
4. **WILLFUL NEGLIGENCE** has no place in law except in actions for loss of life under section 8 of chapter 57, General Statutes; and in actions like this to recover damages for personal injuries not resulting in death, the word "willful" should not be used in the instructions in fixing the degree of neglect.
5. **DAMAGES.**—If defendant was guilty of gross neglect, both compensatory and punitive damages may be awarded.

**WINSLOW & WINSLOW FOR APPELLANT.**

1. The verdict is so excessive as to indicate passion or prejudice. (*L. & N. R. Co. v. Fox*, 11 Bush, 495; *Standard Oil Co. v. Tierney*, 92 Ky., 367; *Louisville Southern R. Co. v. Minogue*, 90 Ky., 369.)

As showing the largest amounts awarded in this State for personal injuries or death other than the cases cited above, the following cases are cited:

*Turnpike Co. v. Stewart*, 2 Met., 122, \$4,000; *L. & N. R. Co. v. Collins*, 2 Duv., 114, \$5,000; *Lou. & Port. R. Co. v. Smith*, 2 Duv., 560, \$1,750; *L. & N. R. Co. v. Robinson*, 4 Bush, 508, \$5,000; *L. & N. R. Co. v. Sickings*, 5 Bush, 2, \$10,000; *Sherley v. Billings*, 8 Bush, 150, \$4,000; *M. & L. R. Co. v. Herrick*, 13 Bush, 126, \$5,000; *L. C. & L. R. Co. v. Goetz's Adm'r*, 79 Ky., 443, \$4,500; *McLeod, Rec'r, v. Ginther's Adm'r*, 80 Ky., 401; *L. & N. R. Co. v. McCoy*, 81 Ky., \$7,593.50; *L. C. & L. R. Co. v. Gutenkuntz*, 82 Ky., 435, \$5,000; *L. & N. R. Co. v. Brooks' Adm'r*, 83 Ky., 131, \$10,000; *L. & N. R. Co. v. Moore*, 83 Ky., 679, \$9,000; *S. C. & C. S. R. Co. v. Ware*, 84 Ky., 275, \$4,000; *L. & N. R. Co. v. Brice*, 84 Ky., 300, \$5,000; *C. P. R'y Co. v. Kuhn*, 86 Ky., 579; *L. & N. R. Co. v. Mitchell*, 87 Ky., 338, \$10,000; *K. C. R. Co. v. McMurtry*, 3 Ky. Law Rep., 625, \$8,000; *L. & N. R. Co. v. Coleman's Adm'r*, 86 Ky. 556, \$3,000; *L. & N. R. Co. v. Roberts*, 10 Ky. Law Rep., 528, \$10,500; *L. & N. R. Co. v. Sheets*, 11 Ky. Law Rep., 781, \$4,000.)

2. The husband's negligence in placing the wife in a dangerous position will bar her recovery. (*Shearman & Redfield on Negligence*, 3rd ed., sec. 46; *Carlisle v. Sheldon*, 38 Vt., 440.)

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It is enough to defeat a recovery by plaintiff that the injury might have been avoided by the exercise of ordinary care on her part. (Shearman & Redfield on Negligence, secs. 34, 36; K. O. R. Co. v. Thomas' Adm'r, 79 Ky., 168.)

8. Willful neglect had no place in or connection with any cause of action attempted to be set up in this action, and no attempt should have been made to define it. (Craddock v. L. & N. R. Co., 13 Ky. Law Rep., 19.)

## WM. LINDSAY ON SAME SIDE.

1. Additional case cited as to excessive damages: *Furnish v. M. P. R. Co.*, 102 Mo., 438; s. c., 22 Am. St. Rep., 781.
2. The court erred in instructing the jury that if the neglect of defendant was gross they might find for defendant if the neglect of plaintiff was also gross. If the plaintiff was guilty of neglect of any degree, but for which the injury would not have happened, the law was for the defendant, and the jury should have been so instructed.
3. It was error to instruct the jury as to willful neglect, as this is a case for personal injuries not resulting in death, and not controlled by the statute. (Craddock v. L. & N. R. Co., 13 Ky. Law Rep., 19.)

## GAUNT &amp; DOWNS FOR APPELLEES.

1. The verdict was not so excessive as to authorize the court to interfere. (Harrold v. New York Elevated t. Co., 24 Hun., 134; Duncan S. Walker v. The Erie Railway Co., 63 Barb., 260.)  
Each case must depend on the facts and circumstances connected with the wrong in the particular case. (Standard Oil Co. v. Tierney, 92 Ky., 367.)
2. The absence of slight care in the management of a railroad train is gross negligence and will authorize the recovery of punitive damages. (Maysville, &c., R. Co. v. Herrick, 13 Bush, 127; Philadelphia R. Co. v. Daly, 14 How. (U. S.), 486; Railroad Co. v. Aspell, 23 Pa., 147; Railroad Co. v. Kenwood, 21 Pa., 208; Choppin v. N. & C. R. Co., 17 La., 191.)
3. The record in this case shows no state of facts that authorized any instruction on the question of contributory negligence.

## J. A. DONALDSON FOR APPELLEES.

1. The power of appellate courts to set aside verdicts upon the ground they are excessive should be exercised only in extreme cases. (L. & N. R. Co. v. Mitchell, 87 Ky., 338.)  
Cases approving large verdicts where the injuries were no greater than the injuries in this case, and where the suffering was not so great: *Lake Shore & Mich. Southern R'y Co. v. Rosenwerg*, 113 Pa. St., 544, \$48,750; *Fair v. L. & N. W. R. Co.*, 21 Law Times, 326, \$26,-

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- 250; *Choppin v. New Orleans & C. R. Co.*, 17 La. Ann., 19, \$25,000; *Shaw v. Boston & Worcester R. Co.*, 8 Gray, 45, \$22,500; *O. & N. W. R. Co. v. Jackson*, 55 Ill., 492, \$18,000; *Caldwell v. N. J. Steamboat Co.*, 56 Barb., 426, \$20,000; *Harrold v. N. Y. Elevated R. Co.*, 24 Hun., 184, \$30,000; *Walker v. Erie & R. W. Co.*, 63 Barb., 260, \$20,000.)
2. The court properly refused to instruct the jury that it was plaintiff's duty to exhibit her ticket before entering the caboose. The relation of carrier and passenger begins when a contract of carriage has been made or the passenger has entered upon any means of conveyance provided by the carrier (2 Am. & Eng. Enc. of Law, p. 744.)
  3. The ordinary negligence of the plaintiff will not exonerate the defendant when the injury was caused by the gross or willful negligence of defendant's servants. (*L. & N. R. Co. v. Collins*, 2 Duv., 116; *L. & N. R. Co. v. Sickings*, 5 Bush, 4; *L. & N. R. Co. v. Filbern*, 6 Bush, 575; *L. C. & L. R. Co. v. Mahoney*, 7 Bush, 289; *P. & M. R. Co. v. Hoehl*, 12 Bush, 48.)
  4. If the plaintiff was guilty of any negligence, it was in her effort to escape from the imminent peril to which she was exposed by the negligence of defendant's servants, and such negligence will not bar a recovery. (2 Am. & Eng. Enc. of Law, 749; *Hutchinson on Carriers*, sec. 662.)
  5. The definitions of gross and willful neglect were proper. (*L. & N. R. Co. v. McCoy*, 81 Ky., 411.)

## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The verdict and judgment in this case was for twenty-six thousand dollars.

In the month of June, in the year 1889, the appellee Nettie Long, the wife of her co-appellee Thomas Long, or her husband for her, purchased tickets for travel on appellant's cars from Eagle Station, where she lived, to Sanders' Station, on the same road, but a short distance below. She entered with her husband and daughter the caboose that constituted a part of freight train No. 32. This train was a local freight train, but was carrying passengers as a carrier under certain regulations by the company, from station to station, located between certain designated points on

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the road. When the freight train reached Eagle Station, where the passengers entered the caboose, the conductor detached his engine from the caboose and a part of the cars, leaving them on the main track, and took the engine, with the cars attached to it, on the switch to unload some freight, or for some other purpose. The caboose seems to have been the only car designed for passengers on this train, and when the appellees entered, it was a distance of forty or fifty feet from the platform of the depot. The conductor of this combined freight and passenger train, knowing there was a through freight train coming after him, sent one of his men, or an employe, to flag any approaching train. It is shown that it was customary for the flagman to go a distance of near one thousand yards to flag coming trains, but in this case the proof conduces to show that the flagman went only about two hundred yards, and was then, from his movements, paying but little attention to his duties, and, on the trial of this case, seems not to have been present to aid in solving the mystery connected with the collision of this passenger train on the main track and the through freight train.

It may be assumed, from the testimony as to his conduct, that he neglected to flag the through train to slow up, and before they could slow up, or the brakemen properly apply the brakes, the caboose was run into and demolished by this through train. It is shown by the testimony of those in charge of the train that the whistle was blown at the proper time and place, signifying its approach, and that the accident resulted from a failure of the brakes,

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for some cause, to work properly, as they approached the station. No reasonable explanation has been given of this sudden stubbornness on the part of the brakes at this particular place, having worked well during the entire trip until it neared this station, and it is therefore manifest that the flagman either failed to notify those on the through train to slow up, or that those in charge of it were so reckless as to continue the speed of the train until they saw the danger ahead, when it was too late to avert it; and we are inclined to conclude that the flagman failed to give the proper signal, and from that fact the injury resulted.

The caboose was left on the main track by the conductor, when he knew the freight train was approaching, and knowing that fact, it was his duty to have exercised the highest degree of caution in notifying the through train that another was on the track. That there was negligence on the part of these employes of the grossest degree, is evident from this record, and this conclusion is reached from the undisputed facts, looking alone to the testimony for the defense.

The appellee Mrs. Long was knocked out of the caboose, and found lying between the main track and the switch unconscious, and badly bruised about the head, neck and shoulders. She was confined to her bed for near four weeks, with her family physician attending her. Since that time he has not administered to her any medicine, or been applied to for relief from the pain she claims she is suffering. It is claimed that her kidneys are affected, with a constant



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desire to urinate, and that the water flows from her involuntarily; that she is deaf, and one of her eyes affected by the injury. Her physicians, or those who have examined her, find no objective symptoms that would indicate permanent injury, and the weight of the testimony conduces to show that she has not received any lasting injury, or if not, her own family physician, as well as other eminent physicians and surgeons, are not able to say that she is permanently injured, but from careful examinations of her person are inclined, at least some of them, to the contrary opinion. That the shock was great, and her entire nervous system seriously affected, there can be no doubt, but that she is permanently injured this court is not authorized to say from the testimony before us.

The other passengers succeeded in leaving the caboose and escaping without material injury, and it is claimed that the appellee was guilty of contributory neglect in not leaving the car sooner, and of like neglect in going upon the caboose without first notifying the conductor, and at a point fifty feet from the depot platform. As to boarding the train from the platform, the rules of the company required the passengers to get on from the road-bed, or wherever the convenience of those in charge of the train required, and such was the custom when converting this caboose into a passenger car, for the passengers would all know that it would at times be difficult and subject the conductor of this local freight train to a great inconvenience, if required to have the caboose opposite the platform that passengers might enter. The appellee and her husband were doing

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what the rules of the company expected of them, and in fact the appellee husband had been the depot agent at Eagle for many years, and was the agent when this collision took place.

We have given this record careful consideration, and find no evidence of contributory neglect on the part of either the appellee or her husband, and the issue in this case is as to the negligence of the defendant's employees—if merely ordinary, compensation was the measure of damages; if gross, the jury had the right to find punitive damages; and from the facts of the record, *as now presented*, the jury being authorized to find the highest degree of neglect, which was gross neglect, the only question before us is, were the damages excessive? And upon this branch of the case if no evidence had been adduced for the defense, when looking alone to the testimony of the appellees, and her family physician, the damages were greatly in excess of the sum the appellee was entitled to recover.

That Mrs. Long was an estimable woman, and at the time of the injury was in the prime and vigor of her womanhood, possessed of every attribute that endeared her to her family, her neighbors and her friends, is shown by the record, and as presented to this court in eloquent terms by counsel, and no doubt with much greater effect to the jury deciding this case. That the triers were honest, fair-minded men there can be no doubt, but when the wife of the neighbor, of the friend, of the countryman, proud of the lovely character pictured by counsel, has been placed in such imminent peril, and suffered so by

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reason of the neglect of one that has no breath of life, except as imparted by the steam that moves it, human sympathy often controls the judgment, and justice is not measured out by verdicts and judgments, as it would be between neighbor and neighbor, when like neglect results in injury.

Nor would this or any other court confine jurors only to such verdicts as are usually rendered between others than corporations. Carriers of passengers owe to them a special duty, and that is to exercise the highest degree of care for the protection of their person from danger by the neglect of those in their employ. This duty should be exacted, and by the imposition by way of punishment when gross neglect appears. This, however, should be done in a rational way, and not, as has been before said in this court, by placing the juror in the position of the husband, whose wife has been injured, or that of the wife, and then asking the question, what sum of money would you take to have your wife placed in such peril, or so injured as that skilled surgeons could not say whether the injury was or not permanent.

The apprehension that serious results might follow would not be entertained by the true husband or wife for the value of the entire railroad; but this is not the way of ascertaining the damages, nor is there any fixed rule by which a court or jury can arrive at what is the sum the plaintiff is entitled to; for it is a character of case where the wrong can not be repaired by mere dollars and cents, or the damages sustained of a character that can be computed in that way. We

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have been referred to several cases by counsel, where similar verdicts in amount have been sustained where the party injured was made a mental or physical wreck by the negligence of the defendant, but the facts of this case do not show such an injury. There is but little contrariety of opinion with the physicians as to the result of the injuries, and all save one see nothing, after examining the plaintiff, that would indicate permanent disability. In the case of *Shaw v. The Boston and Worcester Railroad*, reported in 8th Gray, 45, the injury was such that the wife lost her left arm and a part of the right hand. Her right arm was broken so that it never united. She could not feed or dress herself, with her health and memory much impaired, and other serious wounds upon her person. The character of the finding in cases like this is to be tested, at last, as to the amount, by the average verdicts in cases growing out of personal injuries, when we are considering the question of excessive damages, by looking to the findings of juries in the past, and their approval or disapproval by courts of last resort—such sums as are ordinarily awarded for such injuries; and when comparing these cases with the one before us, can it be said that the damages at first blush are far too much, and such as the mind, free from passion or prejudice, would say was excessive? Taking, therefore, the verdicts in this State, without enumerating them, as found in reported cases, where the injury was as great or greater than here, and the largest verdict sustained is one for fifteen thousand dollars, and this was a case where both legs were amputated, and the neglect as great as in the

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case before us. (Kentucky Central Railroad Co. v. Smith, &c., 98 Ky., 449.)

The damages and finding by juries in cases of willful neglect where death was the result of the injury have not exceeded this sum. These cases having been passed upon, during the existence of corporations for many years, conduce to show what courts and juries have considered as a reasonable sum to be awarded in this class of cases, the verdict in each case lessened or increased by the particular facts and circumstances surrounding it.

In the case of the Louisville Southern Railroad Co. v. Minogue, 90 Ky., 369; the plaintiff sustained external bruises and her nervous system was greatly shocked. She was confined in her bed for eight weeks, and since she left her bed had been unable to walk. The verdict was for ten thousand dollars. This court held the verdict excessive, because it was not shown with reasonable certainty that there was a permanent injury, the medical testimony being as unsatisfactory in that case as in the one before us. It is truly said that a court of last resort should be careful in interfering with the verdicts of juries in cases where the sum to be awarded in damages is within the discretion of the jury, even to the extent claimed by the plaintiff, but this discretion on the part of the jury must be a legal discretion, and in its exercise, if the damages are erroneous, and so appear to a rational mind at first blush, it is not only the right but the duty of the court to interfere and set the verdict aside.

We perceive no objection to the instructions, save

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the word willful, in fixing the degree of neglect, has now no place in the law, and in fact has no place in this case, as the common law rule governed, and not that fixed by statute where death ensues.

The question, as already indicated, is, was the injury caused by the neglect of the appellee's employes when in the discharge of their duty? If so, was it ordinary or gross neglect? If the first, compensation is the measure of damages; if the last, both compensation and punitive damages may be awarded. On another trial contributory neglect may be shown, and we have only said that none appears from the facts as they are now presented.

Reversed and remanded for a new trial consistent with this opinion.

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CASE 73—PETITION EQUITY—MAY 27.

### Hazelett, &c., v. Farthing, &c.

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APPEAL FROM FRANKLIN CIRCUIT COURT.

1. CONSTRUCTION OF DEVISE TO "WIFE AND CHILDREN."—A devise by a testator "to my beloved wife and children," naming the persons intended, and including in the list a step-son, and omitting one of the testator's own children, gives to the persons named a joint and equal interest in the property devised, and not merely a life estate to the wife, remainder to the other persons named.
2. WHERE A TESTATOR DISPOSES OF HIS HOMESTEAD BY HIS WILL, and the widow accepts the provisions of the will, neither she nor the testator's children can claim a homestead right, a person having the right to dispose of his homestead by his will as he may choose, subject only to the right of the wife to renounce the will and claim under the statute.

A testator having devised his homestead to his wife and a portion of his children, an excluded child having inherited an interest by the

94	421
108	540
108	542
94	421
1133	382

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death of one of the devisees, is entitled to have the property divided and her interest allotted to her.

RUFUS S. DINKLE FOR APPELLANTS.

1. One can not claim under and against a will at the same time. (*Watson v. Christian*, 12 Bush, 424; *Vance, &c. v. Campbell's Heirs*, 1 Dana, 229; *Chambers, &c., v. Davis*, 5 B. M., 522; *Taylor v. Loller's Ex'rs*, 8 Ky. Law Rep., 73.)
2. The widow having lost her right to the homestead by accepting the provisions of the will, the homestead is also destroyed as to the children. (5 Ky. Law Rep., 580; *Watson v. Christian*, 12 Bush, 524.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The land in question is included by the fourth clause of the will of George Farthing: "I will and devise to my beloved wife and children, namely: Susan Francis Farthing, Charles W. Farthing, H. M. Pulliam, N. J. Farthing, C. B. Farthing, and J. C. Farthing, all the balance of my personal property and real estate, of whatever kind, and I hereby declare this writing to be my only and last will and testament."

It is plain the testator intended to give to his wife not a life estate, remainder to the others named in that clause, but a joint and equal interest in the fifty-two acres with them; for one of his children, plaintiff and appellant, Mary E. Hazelett, was purposely excluded from any interest, while one of those named, H. M. Pulliam, was not his child, but a stepson, he having been twice married, and having at his death two sets of children.

It is alleged in the petition of plaintiff that the widow, who is her step-mother, accepted provisions of her husband's will, and has, together with infant children, occupied the land under it for twelve years

past. The relief prayed for is sale of the land, and division of the proceeds, a portion of which plaintiff claims in right of her full brother, one of the persons named in the fourth clause, but since deceased.

Section 14, article 13, chapter 38, General Statutes, it seems to us, was intended to apply in case of the husband dying intestate, when, as thereby provided, "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the unmarried infant child arrives at full age."

It is true the widow may, by renouncing the will, not, however, done in this case, claim and have benefit of a homestead or dower right in land, but not both. But a person was not intended, by what is called the homestead law, to be precluded from disposing of his homestead by will in any manner he might choose, though of course subject to right of his wife to renounce the will and claim under the statute.

In our opinion, the case of *Elmore v. Elmore's Adm'r*, 5 Ky. Law Rep., 580, is conclusive of the right of both the widow and children of the testator, George Farthing. It was there held that the widow having accepted the provisions of the will, she had no right of homestead, and, if she has none, the children in such state of case have none. The latter part of section 14 provides: "But the termination of the widow's occupancy shall not affect the right of the children; but said land may be sold subject to the right of said widow and children, if a sale is necessary to pay debts of the husband."



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It has accordingly been held by this court that the widow could not, by terminating her occupancy, nor otherwise, deprive the infant children of their homestead right. But such rule applies only in cases where the widow and children become entitled to a homestead by operation of law, not where the husband and father has otherwise disposed of his land by will. Neither the widow or infant children had, when this action was commenced, a homestead right to the land of testator, George Farthing, but appellant was entitled to have the land sold, not being susceptible of division, and the share of proceeds of sale she inherited from her deceased brother allotted to her.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CASE 74—PETITION ORDINARY—MAY 27.

Louisville and Nashville Railroad Company v.  
Schmetzer, by, &c.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. RAILROADS—MOVEMENT OF DETACHED CARS.—A railroad company is guilty of willful neglect if it permits cars detached from an engine to move along its track in a city or town without some servant in a position to give warning of the approach of the cars, and to control their movement. And where the company is guilty of such neglect, a pedestrian on the track who is struck by the cars and injured may recover of the company, although he failed to look to see whether cars were approaching.
2. SAME—DUTY TO PERSONS WALKING ON TRACK BY LICENSE OF COMPANY—ACCIDENTAL BREAKING OF TRAIN.—A person who uses a railroad track as a passway, whether by the license or mere acquiescence of the company, must be held to know the danger attending:

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the running of railroad trains, and to assume the ordinary risks attending such a use of the track. Therefore, where cars have become detached from an engine by accident, and are moving in that way without any servant in position to give warning of their approach, a pedestrian on the track who is struck by the cars and injured can not recover of the company unless the break in the train was due to negligence on the part of the servants in charge, or to some defect in the machinery which the company had failed, after notice, to repair, as such a person can not exact of the company a higher degree of diligence than it owes to an employe. Nor does the fact that such breaks in a train are frequent at a particular part of the track, by reason of the grade, impose upon the company the duty of placing servants in a position to give warning to persons walking on the track.

## LITTLETON COOKE FOR APPELLANT.

1. Railroad trains have the preference to right of way at public crossings. (Lou., Cin. & Lex. R. R. Co. v. Goetz's Adm'r, 79 Ky., 447.)
2. Duty of railroad companies in respect to persons upon their tracks. (Davis v. Chicago & Northwestern R'y Co., 15 vol. Amer. and Eng. R. R. Cases, 424; L. & N. R. R. Co. v. Cooper's Adm'r, 8 Ky. Law Rep., 624; Same v. Same, 7 Ky. Law Rep., 102; L. & N. R. R. Co. v. Howard's Adm'r, 6 Ky. Law Rep., 168; Nichols' Adm'r v. L. & N. R. R. Co., 9 Ky. Law Rep., 702; Johns' Adm'r v. L. & N. R. R. Co., 10 Ky. Law Rep., 758; Ills. Cent. R. R. Co. v. Dick, 12 Ky. Law Rep., 772; Hogan v. Chi., Mil. & St. Paul R. R. Co., 15 Amer. and Eng. R. R. Cases, 445; Wheelwright v. The Boston and Albany R. R. Co., 16 Amer. and Eng. R. R. Cases, 815 and 185 Mass., 225.)
3. Passive acquiescence does not amount to a license. (Finlayson v. Chicago, &c., R. R. Co., 1 Dillon, U. S. Ct., 579; Bancroft v. Boston, &c., R. R. Co., 97 Mass., 276; Gaynor v. Old Colony R. R. Co., 100 Mass., 508; Jeffersonville, &c., R. R. Co. v. Goldsmith, 47 Ind., 48; Indiana, &c., R. R. Co. v. Hudelson, 18 Ind., 525; Galena, &c., R. R. Co. v. Jacobs, 20 Ills., 478; Illinois, &c., R. R. Co. v. Hetherington, 88 Ills., 510; McLaren v. Indianapolis, &c., R. R. Co., 8 Amer. and Eng. R. R. Cases, 217; Yarnall v. St. L., K. C. & M. R. R. Co., 10 Amer. and Eng. R. R. Cases, 726; Hogan v. Chicago, &c., R. R. Co., 15 Amer. and Eng. R. R. Cases, 489; Central R. R. Co. of Georgia v. Brinson, 10 Ga., 207, and 19 Amer. and Eng. R. R. Cases, 42; Glass v. Memphis & Charleston R. R. Co., 10 Southern Rep., 215.)
4. Railroad companies entitled to the exclusive use of their tracks, except at public crossings, &c. (Cauley v. Pitts., Cin., &c., R'y Co., 2 Amer. and Eng. R. R. Cases, 6; Ky. Central R. R. Co. v. Gastineau's Adm'r, 88 Ky., 119; Johns' Adm'r v. L. & N. R. R. Co., 10 Ky. Law Rep., 759.)

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5. Persons on or approaching railroad tracks must use their senses for seeing and hearing, &c. (Rupard v. Chesapeake & Ohio R. R. Co., 88 Ky., 280; Shackelford's Adm'r v. L. & N. R. R. Co., 7 Ky. Law Rep., 729, and 84 Ky., 48; Nichols' Adm'r v. Same, 9 Ky. Law Rep., 702; Pittsburg, &c., R. R. Co. v. Bingham, 89 Ohio St., 364; Omaha, &c., R. R. Co. v. Martin, 14 Neb. Rep., 295; L. & N. R. R. Co. v. Yneistra, 29 Amer. and Eng. R. R. Cases, 297; Mulherrin v. Del., Lack. & Western R. R. Co., 81 Penn. State, 366; Cauley v. P. C. & St. L. R'y Co., 2 Amer. and Eng. R. R. Cases, 4; Railroad Company v. Houston, 95 U. S., 697.)
6. Railroad companies owe no duty to trespassers upon their tracks until those operating trains see and know the peril in which trespassers have placed themselves. (L. & N. R. R. Co. v. Lyter, 6 Ky. Law Rep., 233; L. & N. R. R. Co. v. Cooper's Adm'r, 8 Ky. Law Rep., 624; Same v. Same, 7 Ky. Law Rep., 102; L. & N. R. R. Co. v. Howard's Adm'r, 6 Ky. Law Rep., 168; Shackelford's Adm'r v. L. & N. R. R. Co., 7 Ky. Law Rep., 729, and 84 Ky., 48; Nichols' Adm'r v. L. & N. R. R. Co., 9 Ky. Law Rep., 702; Pittsburg, &c., R. R. Co. v. Bingham, 89 Ohio St., 364; Omaha, &c., R. R. Co. v. Martin, 14 Neb., 295; L. & N. R. R. Co. v. Yneistra, 29 Amer. and Eng. R. R. Cases, 297; Mulherrin v. Del., Lack. & Western R. R. Co., 81 Penn., 366; Cauley v. P., C. & St. L. R. R. Co., 2 Amer. and Eng. R. R. Cases, 4; Railroad Company v. Houston, 95 U. S., 697.)
7. Minors from twelve to fifteen years of age to be treated as adults. (Ky. Central R. R. Co. v. Gastineau's Adm'r, 88 Ky., 119; Paducah & Memphis R. R. Co. v. Hoehl, 12 Bush, 41.)
8. It is error for a trial court to instruct a jury upon a hypothesis not sustained by the evidence. (L. & N. R. R. Co. v. Jones, 11 Ky. Law Rep., 281; Stout v. Cloud, 5 Littell, 206; Adams v. Tiernan, 6 Dana, 395; Stith v. Jones, 4 B. Monroe, 375; Murphy v. May, 9 Bush, 39; Blair v. Pollock, Littell's Selected Cases, 208.)

WM. LINDSAY AND EDWARD W. HINES ON SAME SIDE.

1. The plaintiff was guilty of contributory negligence in not looking and listening for approaching trains, the place being one where the speed of trains was not required to be slackened or signals of their approach given. (Ramsey v. Lou., Cin. & Lex. R. Co., 89 Ky., 99; Carlin v. Chicago, &c., R. Co., 37 Iowa, 323; McAdoo v. Richmond, &c., R. Co., 105 N. C.; s. c. 41 Am. & Eng. Railroad Cases, 524; Smith v. Central Railroad and Banking Co., 82 Ga., 801; s. c. 41 Am. & Eng. Railroad Cases, 490; Sabine and East Texas R. Co. v. Dean, 76 Texas, 73; Harty v. Central R. Co., 42 N. Y., 468.)
2. In every case where this court has held a railroad company liable for injuries resulting from the movement of detached cars without any person in charge of them, it has appeared that the cars were moving

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in that way by design of the company, and not merely by accident or as the result of some previous act of negligence. (Shelby's Adm'r v. Railroad Co., 85 Ky., 224; Conley's Adm'r v. Cincinnati, &c., R. Co., 89 Ky., 402; L. & N. R. Co. v. Potts, 92 Ky., 80.)

3. The breaking of the train was one of the perils of the track, the risk of which the plaintiff took, even though he be regarded as on the track by permission of the company. (Davis v. Chicago, &c., R. Co. (Wis.), 15 Am. & Eng. Railroad Cases, 437; Nicholson v. Erie R. Co., 41 N. Y., 540; Sutton v. New York Central, &c., R. Co., 66 N. Y., 243.)

**KOHN, BAIRD & SPECKERT FOR APPELLEE.**

1. The appellee was not a trespasser; but it is negligence *even as to a trespasser on the track* to permit detached cars to move along the track in a town or city without any servant in position to control their movements or give warning of their approach. (Conley's Adm'r v. Cincinnati, &c., R. Co., 89 Ky., 402; L. & N. R. Co. v. Potts, 92 Ky., 80; Shelby's Adm'r v. Cincinnati, &c., R. Co., 85 Ky., 224.)
2. The plaintiff was not guilty of contributory negligence in not looking and listening for approaching trains; and in any event it was a question for the jury, and the court properly refused a peremptory instruction. (L. & N. R. Co. v. Schuster, 10 Ky. Law Rep., 65; Cahill v. Cincinnati, &c., R. Co., 92 Ky., 845; Wright v. Cincinnati, &c., R. Co., 93 Ky.; Duane v. C. & N. W. R. Co., 40 N. W. Rep., 394; D. L. & W. R. Co. v. Converse, 130 U. S., 469; French v. Taunton Branch R. Co., 116 Mass., 537; York v. Maine Central R. Co., 24 Atl. Rep., 790.)

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

The appellee Jacob Schmuetzer, a boy about eighteen years of age, was employed as a laborer by the Eclipse Woolen Mills, located in the city of Louisville. While engaged in his work, and in order to reach the place of his employment, he was in the habit of walking upon the railroad track of the appellant. In using this track as a way, he saved walking a distance of three or four squares, the testimony showing that if he used the streets as a way to his work the distance would be five times

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as great as that of the company's railway track. While on this track and on his way to work, he was struck by the car of the appellant; knocked from the track and his arm so badly injured that it had to be amputated.

He instituted this action to recover damages for the injury on the ground of negligence on the part of the employes, and recovered six thousand dollars in damages. He left his home on the morning of the day he was injured, about six o'clock (in the month of November), and when on the track north of Broadway, and going towards Baxter avenue, he heard a train approaching, and, stepping from the track, let the engine and the train pass him. The morning, according to the testimony for the plaintiff, was dark and foggy. After the train had passed, supposing he was out of danger, he stepped back upon the track, and began his walk to his place of business, and after he had gone some eight or ten yards he was struck by the rear section of the cars that had broken loose from the engine, knocked down and his arm mashed off. This section, loosened from the engine, consisted of twenty-six loaded freight cars.

The appellee claims he had the right to use this track for the reason that the company had licensed the public to use it; that it was constantly used by pedestrians, and had been used by the appellee for two or three years, and no objection had been made by the company, or notice given that the track was not to be used as a foot-path. From these facts, a license to walk upon the track, it is contended, must be presumed, and the company required to exercise

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that degree of care that must be exercised at public crossings, or where, by contract, the party injured has the right to use the track as a foot-path.

While the mere acquiescence of the company in the use of its road in such a manner would authorize the court to say that the plaintiff was not a trespasser, it certainly placed the company under no greater obligation to protect the injured party than one of its own employes. It is not pretended that the accident took place at any crossing, and the license to be on the track at the point where the injury occurred is to be inferred from the fact that the pedestrians in that part of the city had converted that part of the road into a foot-path, and were using it in common with the railroad company.

It is evident, as has been held in the case of *L. & N. R. Co. v. Potts*, 92 Ky., 30, that a railroad company is guilty of willful neglect if it permits cars that have been detached from an engine to move along its track in a city or town, without placing some of its servants in such a position as to give warning of its approach and control the movement of cars. This doctrine is well understood, and if there was no one on these detached cars, and they were turned loose to guide themselves, it was negligence. The appellee, when he went upon the track, after the engine and cars attached to it had passed, never looked to see whether other cars were or not approaching, and with this neglect on his part, the company would have still been held liable, if guilty of such gross neglect as to turn cars loose, when they knew that persons were using this track, whether by license

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or mere acquiescence, and from which an injury resulted. The plaintiff's witnesses saw no one on the detached train, and the plaintiff presenting a case where he had been injured by those cars, with no one to control them, would have been entitled to a verdict upon the testimony, and the court, therefore, refused properly on the plaintiff's evidence to instruct as in case of a non-suit.

The defense is not only contributory negligence, but a denial of all negligence by the company. It is plain that this company owed no special duty to the plaintiff, and was compelled only to use ordinary care for the protection of those who had voluntarily undertaken to use this track by the acquiescence of the appellant. Here was a train of over twenty cars upon the track detached from any engine, and from the testimony of the plaintiff, negligence must be presumed when unexplained. How is this explanation made by the defense? and when the facts are developed, can the railway company be said, as a matter of law, to have been guilty of any negligence whatever?

The testimony, uncontradicted, is to the effect that the train broke or was severed at or near Broadway, leaving ten cars attached to the engine, and the remaining cars were left with two brakemen upon the top of them—one about five cars back from the first detached car and one on the last detached car. These brakemen stopped the train, the detached cars, by applying the brakes as quickly as possible, and not one of them seems to have seen the unfortunate boy. The engine, with the cars attached, had passed the

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appellee, and was increasing its speed so as to keep out of the way of the loosened cars, and those on the detached cars were busy with their brakes, and it was perfectly natural that they did not see him or notice the unfortunate occurrence.

It is not an unusual occurrence for these heavy freight trains to sever as the proof shows, and particularly in going down the grade at this point. It does not appear that the pins were defective or the machinery to which they were attached out of repair. One of the witnesses for the defense says the pin may have been too small, but whether so he does not pretend to say. He was only attempting to assign a reason for the breaking of this train, and from all the testimony before us these employes were not guilty of any degree of neglect causing this injury. There is no reason to discredit them, and the fact that they were not seen on the top of the cars by two or more who testify, affords no reason for disbelieving their statements, and if they had not been on the detached cars, but on one of the ten cars following the engine, this would not have been such negligence as would authorize a recovery, because their being at the one end of the train or the other could not have caused the severing of the train.

The witnesses for the defense state that the morning was clear and bright, while those for the plaintiff say it was foggy and dark, but let it be either way, the endeavor to stop the detached train prevented them seeing the plaintiff, and every effort was made by those on the train to check its progress.

The company was using its road in the ordinary



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way, and the mere passive acquiescence in the use of its track by those who were not passengers, or to whom the company owed no special duty by contract or otherwise, did not make it responsible for an injury resulting from causes that the employes could not prevent. If this had been an employe injured, he would have been held to have assumed the ordinary risks pertaining to such an employment, and one who undertakes to travel on foot on a railway track can not exact a higher degree of diligence on the part of those in charge of the train than an employe.

Pedestrians using railroad tracks must be held to know the danger ordinarily attending the running of railroad trains, and there is no reason for holding the company responsible, unless it is shown that the defects in the machinery were known to the company, and its failure to repair so as to prevent injury. It is argued that the company knew that such severing of the cars frequently took place at this down grade, and should have used such precaution as to have prevented it, and to so rule would impose on the company the duty of surrendering its track to those passing up and down it, or have employes stationed along its track to caution those using it of the danger. The case of *Illinois Central Railway Co. v. Dick*, 91 Ky., 434, sustains this view of the question raised. If the breaking of the train was caused by the negligence of the employes there might be some reason for sustaining this verdict, but we have been unable to perceive in what this negligence consisted, and after a careful reading

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of the record, it must be held that this verdict has no evidence to support it.

The judgment below is reversed, and remanded for a new trial, and for proceedings consistent with this opinion. (Hogan v. Chicago Railway Co., 15 Am. & English Railroad Cases, 440.)

## CASE 75—PETITION ORDINARY—MAY 27.

## Perkins v. Stein &amp; Co.

## APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. TO CONSTITUTE AN ASSAULT AND BATTERY within the meaning of section 1 of chapter 10 of General Statutes, which provides that actions for assault and battery shall die with the person, the act complained of must be done with a hostile intent. Mere acts of negligence do not constitute an assault and battery within the meaning of the statute, even when trespass would lie.
2. SURVIVOR OF ACTIONS.—An action against a master to recover damages for personal injuries resulting from the negligent driving of his servant survives to the personal representative of the person injured.

## F. HAGAN AND A. H. MARRET, JR., FOR APPELLANT.

1. Mere acts of negligence do not constitute an assault and battery within the meaning of section 1 of chapter 10, General Statutes. (Anderson v. Arnold's Ex'or, 79 Ky., 370.)
2. In cases where defendants are sued for the acts of their agents, the action must be *case*, and where *case* lies the action survives (Chitty, vol. 1, 142, 145, 149; 11 Price, 608; Rogers v. Imbleton, 2 Bos. & Pull., 117; McManus v. Crickett, 1 East, 106; Morley v. Gaisford, 2 H. Blackstone, 442; Haggett v. Montgomery, 2 N. R., 446; 12 Ky. Law Rep., 627.)

## ED. M. LOUIS FOR APPELLEE.

This is an action of trespass, *vi et armis*, and an assault and battery, and, therefore, can not be revived. (Gen. Stats., chap. 10, sec. 1; Anderson v. Arnold's Ex'or, 79 Ky., 370)

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JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The petition of Perkins averred that the appellees were the owners of a large brewery in Louisville, Kentucky, and of numerous brewery wagons, used for the purpose of delivering beer; that whilst so engaged the agents and drivers of the appellees carelessly, negligently and recklessly ran into, over and upon the plaintiff, and bruised and injured him externally and internally, the wagon running over his left ankle and the shafts striking him in the breast; that thereby he was knocked down and trampled upon by the horses of the defendants' wagon, and confined to his room, &c., all to his injury in the sum of five thousand dollars.

The defendants, by answer, put in issue the material allegations of the petition, and by an amended petition pleaded contributory negligence on the part of the plaintiff. Whilst the action was pending the plaintiff Perkins died, and thereupon his administratrix, the appellant here, moved to revive the action, filing the proper evidence of her qualification. The court overruled the motion. She has appealed to this court, and the sole question presented is, does the action survive to the personal representative?

Section 1 of chapter 10, General Statutes, provides that "no right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those

excepted, an action may be brought or revived by the personal representative or against the personal representative, heir or devisee in the same manner as causes of action founded on contract."

It is contended by the appellees that the negligent act of the servant or driver in running over the plaintiff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act, an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of *Anderson v. Arnold's Ex'or*, 79 Ky., 370, dies with the person. We do not think, however, that the action is one of trespass. While the injury was the *immediate* consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the *act* of the master; the latter may be responsible in damages, indeed ordinarily is, for the negligence of his servant, but *case* and not trespass is the proper remedy.

It was said in *Johnson v. Castleman, &c.*, 2 Dana, 377, that in considering these forms of action, "the distinction that exists between the defendant himself doing the act complained of, and its being done by an agent," must be borne constantly in mind. But, though case be the proper form of action, yet if the cause of action arise from, or grow out of, an assault and battery, it dies with the person. The vital question then is, what is an assault and battery in the meaning of the statute? "An assault is defined to be an inchoate violence to the person

of another, with the present means of carrying the intent into effect." (2 Greenleaf on Evidence, section 82.) "The *intention to do harm* is of the essence of an assault." (*Ib.*, section 83.) "An assault is an attempt with violence to do a person some bodily harm, as by holding up a fist, striking at another with a stick, which does not touch the latter, or throwing anything at a person which misses him, or by any similar act of inchoate violence, showing an intention to do injury, and the aggressor being within such a distance from the party assaulted that the intention might possibly be executed." (See in general, Bac. Ab., Assault; Com. Dig., Battery; 3 Bl. Com., 120.)

Mr. Greenleaf, section 82, says: "A battery is the actual infliction of violence on the person. \* The degree of violence is not regarded in the law. \* Thus, any touching of the person in an angry, revengeful, rude or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner to detain him—is a battery. So, striking the skirt of his coat or the cane in his hand is a battery; for any thing attached to the person partakes of its inviolability."

"A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry or revengeful or rude or insolent manner, such as spitting in his face, &c., is a battery

in the eye of the law. \* \* It should be observed that every battery includes an assault." (1 Russ. on Cr., 9th Am. Ed., 1020.)

Bishop, in his work on Criminal Law, volume 2, section 72, says that to constitute a battery "there must be some sort of evil in the intent."

We are, therefore, prepared to say that to constitute an assault and battery under the foregoing definitions the act complained of must be done with a hostile intent. It is true that Mr. Greenleaf, in his work on Evidence, under the head of Assault and Battery, volume 2, section 85, says that "thus, if one of two persons fighting, unintentionally strikes a third, or if one uncocks his gun without elevating the muzzle, or other due precaution, and it accidentally goes off and hurts a looker on; or if he drives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse taking fright injures another, he is liable for the *battery*;" but an examination of the cases cited as the basis of the text show merely that for these various instances of negligence the person injured has his remedy by action of trespass. They are not meant as instances of assault and battery at the common law. Undoubtedly, cases of extreme recklessness, as furiously riding or driving into or upon a crowd, may be instanced, indicating or implying an evil or hostile design, but such is not the case under consideration. Under the petition as drawn the plaintiff is entitled to recover upon showing any degree of negligence, whether ordinary or gross, and we do not think that mere acts of negligence, in any of its degrees, are assaults and batteries in the meaning of the statute.

The only authority relied on by the appellee, and upon which it is contended the lower court overruled the motion to revive, is that of *Anderson v. Arnold's Ex'or*, *supra*. There Anderson sued the executor of Arnold, alleging that Arnold had "negligently and recklessly, *but not intentionally*," inflicted a wound upon the body of the plaintiff by shooting him with a pistol, &c. A demurrer was sustained on the ground that the cause of action died with the person, and the judgment of the lower court was affirmed by this court. In that case the distinction between actions of trespass and of case was discussed, and the cause of action was determined to be trespass and not case, and therefore, did not survive—but it was by no means held that all actions of trespass were common law assaults and batteries. "Following, therefore," says the court, "this common law definition, it was an assault and battery committed upon the plaintiff, *although the shot was fired at a third person*; and the meaning of the words *assault and battery* will not be restricted to an actual and intentional beating of another so as to authorize a recovery." The petition charged that Arnold *unintentionally* shot and wounded the plaintiff, but the *shot was fired intentionally* at another, and therefore, under abundant common law authority, it was an assault and battery. The act of shooting was done with hostile intent, though the wounding of the plaintiff was unintentional. We do not think the case relied on was meant to decide or decides that unintentional cases of injury, occurring through negligence and without design, even when trespass

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would lie, are assaults and batteries. We are of opinion that under the statute quoted, the action survived to the administratrix of Perkins, and her motion to revive should have been sustained.

Judgment reversed, with directions to enter the order of revivor as herein indicated.

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APPEALS FROM LOUISVILLE CHANCERY COURT.

**EXEMPTIONS FROM TAXATION.**—A statute should never be so construed as to exempt a particular person from taxation for any purpose, unless the language used clearly and expressly requires it to be done.

A provision in the charter of an orphan asylum exempting its property "from assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the city of Louisville," does not give exemption from local assessments to pay the cost of street improvements.

H. M. LANE FOR APPELLANT.

1. The exemption claimed is without consideration, and, therefore, unconstitutional. (St. Mary Industrial School v. Brown, 45 Md., 323; Commonwealth v. Masonic Temple Co., 87 Ky., 356; Gordon v. Winchester, 12 Bush, 114; Barbour v. Louisville Board of Trade, 82 Ky., 645; Burroughs on Taxation, sec. 25; Cooley on Taxation, pp. 88, 89; Philadelphia v. Wood, 89 Pa. St., 82; 11 Ky. Law Rep., 838; Cooley on Taxation, p. 107; Sharpless v. Philadelphia, 21 Pa. St., 147; 89 Pa. St., 352; 1 Hill, 50; 11 Pick., 396; 16 Mich., 209; 22 Wis., 680; 64 Ill., 427; 6 N. J., 352.)
2. Even if the exemption is valid, it does not apply to local assessments for street improvements. (Broadway, &c., v. McAtee, 8 Bush, 518; Loeser v. Redd, 14 Bush, 28; Elliott on Roads and Streets, 376.)

H. S. BARKER OF COUNSEL ON SAME SIDE.



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**STROTHER & GORDON FOR APPELLEES.**

The defendants being charitable institutions, the exemption is valid, and it applies as well to local assessments for street improvements as to any other form of taxation. (*Commonwealth v. Masonic Temple Co.*, 87 Ky., 356; *Lancaster v. Clayton*, 86 Ky., 376, 379; *Barbour v. Louisville Board of Trade*, 82 Ky., 654; *Burroughs on Taxation*, p. 25; *Zable v. Baptist Orphans' Home*, 92 Ky., 89.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

These two actions, brought by appellant against appellees respectively, were tried and determined by the lower court together, as will be done on this appeal. The object of each is enforcement of a lien on a lot of land for proportionate cost of improving an adjacent street by appellant in pursuance of an ordinance of the general council, and under contract with the city of Louisville. There is no question made in either action about his compliance with terms of that contract, nor as to correctness of the amounts assessed and fixed; but the ground relied on as defense in each case is exemption from such assessment existing in virtue of special acts of the General Assembly.

It appears that in 1858 H. P. Johnston conveyed to W. Cornwall and others, in trust, a lot upon which to establish an orphan asylum, to be used as a free home for educating and instructing indigent orphan boys in useful arts and trades. And in 1872 "An act to incorporate the trustees of the Orphanage of the Good Shepherd in the city of Louisville" was passed, whereby W. Cornwall and others, then trustees under the deed mentioned, were declared a body-corporate, to whom the several county courts of the Commonwealth were authorized to bind orphans upon terms agreed to. Section 6 of that act is as follows: "That

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all property now held for the benefit of said orphanage, and all which hereafter may be so held, shall be, and the same is hereby, exempted from assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the city of Louisville, and all such property is hereby freed from future charge and payment of taxes to the State and to the city."

In 1872 John P. Morton conveyed to James Craik and others a lot upon which were to be erected buildings suitable for a church home for females, an infirmary for females, an infirmary for males and a chapel; and subsequently "An act to incorporate the Church Home for Females and Infirmary for the Sick" was passed, whereby James Craik and others were created a body-corporate. Section 3 of that act is in the same language as section 6 of the first mentioned act just quoted, differing from it only in application.

The two institutions thus created being manifestly intended for purposes of purely public charities, were, by section 9, article 1, chapter 92, General Statutes, independent of the special acts, exempted from taxation for governmental purposes, as well of the city of Louisville as of the Commonwealth. But taxation for ordinary purposes of government does not properly comprise local assessment for construction of a street, and as a consequence exemption by statute from the first does not necessarily or properly involve exemption from the latter. Accordingly, in *Broadway Baptist Church v. McAtee*, 8 Bush, 508, it was held that exemptions made in the General Statutes in favor

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of church property apply only to taxation for general purposes of government, State, county and municipal, and that, therefore, property of that church was liable for payment of its proper proportion of cost of constructing the particular street there in question.

In *Zable v. Louisville Baptist Orphans' Home*, 92 Ky., 89, the appellant, a contractor, sued to enforce a lien on property of appellee for its proportion of the cost of constructing an adjacent alley, from which the latter claimed exemption in virtue of a special act of the Legislature. In that case the following extract from *Burroughs on Taxation*, (p. 461), was quoted and approved: "The word tax or taxes does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. The question frequently arises in the construction of statutes exempting persons or corporations from payment of taxes, and the almost unbroken current of authority is that such expression does not include local assessment."

The question, therefore, in this case is, whether the two acts relied on by appellees respectively, were intended by the Legislature to exempt their property from local assessment.

In *Zable v. Louisville Baptist Orphans' Home*, the provision of the special act is as follows: "The property, money, estate and rights of said corporation shall be exempt from all taxation whatever." But it was there held the word tax did not embrace local assessment, and that something more was needed to show such was the legislative intention.

The language of the two acts we are considering is,

however, somewhat different from that of the act just mentioned; for it is in both of them provided the property shall be exempt from *assessment* and taxation under revenue laws of the Commonwealth, and also under ordinances of the city of Louisville. But the word "assessment," which means laying a tax or determining the share of tax to be paid by each individual, relates as well to taxes for support of government, as to taxes, or rather enforced contributions, for construction of streets or other local improvements; for the act of assessing must precede collection in either case. It does not, therefore, seem to us that the word assessment, used as it is in the two special statutes, without qualification or explanation, necessarily or fairly indicates legislative intention to exempt the property of appellees from any other than ordinary taxation for support of the State and municipal governments. And not being clearly and expressly exempted from due proportion of the cost of constructing adjacent streets, it can not be held so exempt without violating a well established rule of construction. For as said in Sedgwick on Statutory and Constitutional Law, 344, statutes under which exemptions from common burdens are claimed "are regarded with a jealous eye and strictly construed."

In support of the construction we have given the two statutes in question, we cite the case of *The State, &c., v. The Mayor and Common Council of Newark*, 35 N. J. Law, 157. There the Protestant Foster Society claimed exemption from the cost of constructing or improving streets under its charter,

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by which it was enacted, that the property of the society "shall not be subject to taxes or assessments," which is nearly the same language used in the two statutes we are considering. But the court in that case held that the word "taxes" must, in the absence of any clear indication to the contrary, be understood to refer exclusively to the ordinary public taxes; and that the word "assessments" has reference to burdens of the same general character as those expressed in the word "taxes," and was not intended to include local assessments for municipal purposes.

In our opinion a statute should never be so construed as to exempt a particular person or corporation from taxation for any purpose, whereby the burden falls so much heavier on others having no greater interest at stake or duty to perform, unless the language used clearly and expressly requires it to be done. In these cases it may be fairly presumed that if the Legislature had intended to exempt the property of appellees from the cost of local improvements, it would have been plainly and fully indicated by additional or other words than the single and insufficient term "assessment."

Whether the two statutes would be valid if susceptible of the construction contended for by appellees is a question we need not determine, because we think the exemption claimed was not granted.

Wherefore, the judgment in each case is reversed, and cause remanded for proceedings consistent with this opinion.

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 Phillips, &c., v. Thomas Lumber Company.
 

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CASE 77—PETITION EQUITY—JUNE 2.

## Phillips, &amp;c., v. Thomas Lumber Company.

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APPEAL FROM PIKE CIRCUIT COURT.

WHETHER A WRITING IS A DEED OR A WILL DEPENDS UPON THE INTENTION OF THE MAKER as gathered from the whole instrument.

A writing by which the maker recites that a specific boundary of land "is deeded" to his wife for life and at her death to go to his grandson, further reciting that "this deed is not to take effect" until his death, and that he is "to have and keep full possession of said farm during his life," is to be regarded as a deed taking effect at once, and reserving to the grantor merely a life estate; and the deed having been recorded, one to whom the grantor subsequently sold and conveyed all the valuable timber standing on the land, is not entitled to enter for the purpose of taking the timber, the grantor being dead.

R. T. BURNS AND STEWART &amp; STEWART FOR APPELLANTS.

The writing upon which appellant relies is a deed and not a will. The intention of the grantor as gathered from the whole instrument must control. (*Henderson v. Mack*, 82 Ky., 379; *Bodine's Adm'r v. Arthur, &c.*, 91 Ky., 53; *Reynolds v. McFarland*, 10 Ky. Law Rep., 932; *Owings v. Hill*, 9 Ky. Law Rep., 468; *Bench, et al. v. Nicks, et al.*, 50 Ark., 367; *White v. Hopkins*, 79 Ga., 430.)

L. T. MOORE AND JOHN F. HAGER FOR APPELLEES.

The instrument under consideration does not take effect until the death of the maker, and is, therefore, testamentary in its character, and for that reason revocable. (*Leaver v. Gausa*, 62 Iowa, 214; *Babb v. Harrison*, 9 Rich. Eq., 111; s. c., 70 Am. Dec., 203; *Turner v. Scott*, 51 Pa. St., 126; *Devlin on Deeds*, sec. 309; *Johnson v. Yancey*, 20 Ga., 707; s. c., 65 Am. Dec., 646; *Simon v. Wildt*, 84 Ky., 157; *Habersham v. Vincent*, 2 Ves. Jr., 204.)

Subsequent acts and conduct respecting the land are entitled to great weight as showing the interpretation put upon the instrument by the maker. (*Livingston v. Ten Broeck*, 16 John., 23.)

2. The petition of appellant is not sufficient in that it fails to specifically charge that the purchase by appellee was with actual notice of the previous alienation of the land by Jesse Phillips to appellant. Actual notice is a vital requirement in every case where a volunteer seeks to recover against the subsequent deed of his grantor to a purchaser for value. (*Enderas v. Williams*, 1 Met., 358; *Winter, &c., v. Mannen, &c.*, 81 Ky., 123; 1 Duv., 62; 84 Ky., 2; 2 Duv., 167; 2 Met., 230; *Story's Eq. Pleadings*, sec. 263.)

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## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Jesse Phillips, in consideration of the kind treatment of his wife Vicey, and the love and affection he had for his grandson John Phillips, as he expresses it, granted and conveyed to them his lands upon which he lived, describing them by a specific boundary, in the following manner: "This land is deeded to Vicey E. Phillips during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to John Phillips, son of William Phillips, deceased, and his heirs forever. This deed is not to take effect until the death of Jesse Phillips, and Jesse Phillips is to have and keep full possession of said farm during his life, and to have all proceeds of said farm until his death; and if said John should get in debt, or any thing that would sell the land, then at the time of sale it is to go to his children," &c.

The deed was lodged for record and recorded in the county of the grantor's residence, and where the land is located, and the grantor lived upon it until his death, that occurred not long before this action was instituted.

After this conveyance to his wife and grandson, the grantor sold and conveyed to the appellee, the Thomas Lumber Company, all the valuable timber standing upon this land, the consideration paid being some twenty-three hundred dollars. This deed was also admitted to record.

After the death of the grantor the appellee claimed the right to use and occupy this land for the purpose of getting the timber from it, and asserting its right

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to the timber by reason of this conveyance made subsequent to that made to the appellant.

The appellant filed this petition claiming the land under the conveyance from his grandfather, and sought to prevent the appellee Lumber Company from entering upon the land to cut this timber or removing it from the premises, alleging that its deed was a cloud upon his title, and that the timber gave to the land its principal value; that the appellee had obtained the deed by fraud from his grandfather, and the evidences of his (appellant's) rights were of record, and known by the defendant. A demurrer was sustained to the petition and the petition dismissed.

It is insisted by counsel for the appellant that no estate of any kind was created by Jesse Phillips before his death, and that his right to dispose of either the timber or land so as to pass the fee never having been parted with, the conveyance to the appellee gave it a full and perfect right to the timber. This contention of counsel is based upon the provision in the deed to his wife and grandson, which says: "*This deed is not to take effect until the death of Jesse Phillips,*" and the sale of the timber having been made before that deed took effect, the title to the purchaser is complete.

The case from 62 Iowa, 314, of Leaver v. Gauss, used the language: "To commence after the death of the grantors, it being understood between the grantors and the grantee that the grantee shall have no interest in the premises as long as the grantors, or either of them, shall live;" and it was held that the provision in that instrument was testamentary in its character,



and revocable at any time by the grantor. Other cases have been cited, and proceed on the idea that a postponement of the enjoyment of the estate by the grantor leads to the conclusion that the gift or grant is testamentary and revocable, unless it plainly appears that a future interest was presently given and irrevocable. (Babb v. Harrison, 9 Richardson Equity, 111, 70 Am. Dec., 203; Turner v. Scott, 51 Pa. State, 126.)

It may be said that where no interest is vested or contingent in the grantee until the death of the maker, and no intent to pass title, the doctrine contended for must prevail. The language used must fix the interest of the grantee and determine whether the instrument is a deed or merely testamentary in its character.

The fundamental rule in the construction of both wills and deeds, is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used as found in the entire writing.

It is manifest to us, after reading carefully the conveyance to the wife and grandson, that the grantor's intent was to retain possession and control of the land, in so far as the right to its cultivation and its products was concerned, during his life; and after his death to his wife for life and then to his grandson. He conveyed the estate to his wife for life, and then to John, but the draftsman seeing that this would deprive the grantor of all interest, provided that the deed was not to take effect until his, the grantor's, death, and *Jesse Phillips is to have full possession*

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*of said farm during his life, and to have all proceeds of said farm until his death.* The plain meaning and intention of the testator was to give, and he did give, after his death, a life estate to his wife with remainder over to John. It was a vested remainder in John from the moment the deed was executed and recorded or delivered to him, and while the grant is expressed in awkward terms, it is in no manner ambiguous, but a plain conveyance to his wife for her life, after his death, and then to John. It is like any other estate in remainder where the title vests at the execution and delivery of the deed, but the enjoyment of the estate is postponed until the preceding particular estate is ended. The grantor, by using the language, "this deed not to take effect until my death," meant only that neither John nor his wife was to have the control of his farm or the proceeds until I die; nor is this only an inference from the words used, but the grantor so states in plain and unmistakable language. He made no reservation of the right to sell the land before he died, but retained, as a life tenant, the power to control and manage it, and use its products as he pleased, postponing the time of occupancy by his wife or John until his death. The grantor, by the grant, divested himself of all title save his life estate. (Reynolds v. McFarland, 10 Ky. Law Reporter, 932.)

It is further urged that as this deed was only for a good consideration—that of love and affection—and the appellee had paid full value for the timber, it should be allowed to hold it, unless there was actual notice of the grantor's deed to the appellant, and the fail-

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Hook, &c., v. Joyce.

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ure to make such an averment rendered the petition defective if the main ground relied on is held to be insufficient. We think the petition, from which we have already quoted, presents a cause of action, and the allegations must be, in some manner, controverted, else the appellant is entitled to recover.

The judgment sustaining the demurrer is reversed, and the cause remanded for proceedings consistent with this opinion.

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CASE 78—PETITION ORDINARY—JUNE 20.

Hook, &c., v. Joyce.

APPEAL FROM M'CRACKEN COURT OF COMMON PLEAS.

1. AN EASEMENT MAY BE ACQUIRED AND PERFECTED BY PRESCRIPTION SO AS TO PASS BY DESCENT to heirs at law; and whether acquired by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of fifteen years by even a tort-feasor.
2. ADVERSE POSSESSION OF EASEMENT OF BURIAL.—Burial of the dead body in a cemetery lot is the only possession, when claimed and known, necessary to ultimately create complete ownership of the easement so as to render it inheritable; and as long as gravestones stand, marking the place as burial-ground, the possession is actual, adverse and notorious. Nor can there be an actual adverse possession by an intruder, nor running of the statute of limitations in his favor, while such gravestones stand there, indicating by inscription the previous burial of another.

In this action, by which appellee seeks as heir-at-law to recover of appellant a cemetery lot, in which the bodies of his parents are buried, the title to which is in the city, and in which no more than an easement could at any time exist, the instructions to the jury were as favorable to the appellant as he was entitled to ask.

GILBERT & KOHN FOR APPELLANTS.

Brief withdrawn.

## Hook, &amp;c., v. Joyce.

## SAM HOUSTON FOR APPELLEE.

1. The tombstones caused to be set up on the lot in controversy by Mrs. Joyce, the inscriptions on them, the acts performed, and the declarations accompanying her possession, made by her, are original evidence. (1 Greenleaf on Evidence, sections 105-109.)
2. From use of the lot for twenty years unexplained, it will be presumed to be under claim of right, and adverse. (Miller v. Garlock, 8 Barb., 158; Richard v. Williams, 7 Wheat., 59; Colvin v. Burnett, 17 Wend., 564; School District v. Lynch, 38 Conn., 384; Cheever v. Parsons, 16 Pick., 272; Parker v. Foote, 19 Wend., 309.)
3. The tombstones standing upright on this part of the lot with inscriptions to the memory of the Joyces upon them was notice to Hook and all the world that members of the Joyce family were buried there, and that they were in actual possession of, and claiming said piece of ground, and their possession was adverse to all the world, so far as the exclusive right of burial was concerned. (Gay v. Baker, 17 Mass., 435; s. c. 9, Am. Dec., 160.)
4. An intention to abandon, coupled with acts of abandonment, is necessary to constitute abandonment. (Stokes v. Slinger, 8 Ellis & B., 31, 39; Cook v. Mayor, &c., L. R., 6 Eq. Cas., 177; Hale v. Oldroyd 14 Mees. & W., 789.)

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is in the nature of an action of ejectment brought by appellee to recover of appellant a cemetery lot, and upon the trial the court gave the following instructions:

1. "The court instructs the jury that the parcel of land in contest is a cemetery lot for burial purposes, within the cemetery ground of the city of Paducah, which was purchased by it and laid out into cemetery lots in 1847, and the lot in contest was conveyed by the city to the defendant W. H. Hook, in 1881, by the deed from it to him exhibited in evidence, and under this deed the defendant became the owner of same, and plaintiff can not recover, and they will find for defendant, unless they should believe from the evidence that the plaintiff, M. W. Joyce,

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is the son of Lucinda Joyce, and that plaintiff and Lucinda Joyce, under whom he claims, at any time prior to possession of the defendant Hook, had held the actual adverse possession of the lot in contest continuously, claiming to own same adversely to all the world, against all persons for fifteen years. In which event, he is the owner of the land or lot, and entitled to recover it, and they will find for him unless the jury should further believe from the evidence that defendant Hook thereafter had held the actual adverse possession of the lot continuously, claiming it as his own adversely to all the world and against all persons, for fifteen years before this action was brought. In which latter event also they will find for defendant. And if they find for plaintiff Joyce they will find for him the lot in contest, and assess the damages at whatever sum they may believe from the evidence he has sustained by reason of the removal of the tombstones and the desecration of the graves of his ancestors, not exceeding one hundred dollars.

2. "The court instructs the jury that the deposit of the dead in the grave in burial gives the heir no interest in the soil; and to constitute adverse possession of a cemetery lot, the possession must have been with acts of ownership by the claimant in the preservation and use of the grounds for burial purposes, and under a claim of right as owner openly and notoriously against all the world and all persons."

The legal title of the tract of land within boundary of which the lot in dispute is situated having been

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in Clark when appellee's father was buried there, and conveyed to the city of Paducah at the time his brother was buried, and the gravestones were put there by his mother, no more than an easement in the lot could at any time exist. But such easement, as well as title to the soil, may be acquired and perfected by prescription, the right to which can not be defeated even by the owner of the soil, but will, by descent, pass to heirs-at-law. In this case it appears appellee is the only living child and heir-at-law of Lucinda Joyce, who, after death of her husband, followed by that of a son, caused tombstones to be placed at their graves, the lot to be inclosed and otherwise cared for, and was afterwards herself buried there. The court, therefore, correctly instructed the jury that actual adverse possession of the lot by Lucinda Joyce and plaintiff for fifteen years before entry of appellant gave to them indisputable right to the easement; and the rights of appellant were, at the same time, described and protected by the further instruction to the jury to find for him in case he had acquired and held adversely the lot continuously fifteen years next before commencement of the action; for, like the fee-simple title to land, an easement, whether acquired by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of fifteen years by even a tort-feasor. It seems to us, therefore, the first of the two instructions is unobjectionable. But the question arises, what is the nature and extent of the adverse possession required in order to ultimately ripen into a title to an easement of a

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burial lot? It seems to us burial of the dead body is the only possession, when claimed and known, necessary to ultimately create complete ownership of the easement so as to render it inheritable; and as long as it is inclosed as a burial place, or, even without inclosure, as long as gravestones stand marking the place as burial-ground, the possession is, from the nature of the case, necessarily, and, therefore, in legal contemplation, actual, adverse and notorious. Moreover, there can not be an actual ouster of possession by an intruder, nor running of the statute of limitation in his favor, while such gravestones stand there indicating by inscription the previous burial of another.

It appears that appellee does not now nor has resided in Paducah for many years. But non-residence does not divest an heir-at-law of such easement; the gravestones of his parents being, as long as they stand, conclusive of his claim of ownership as well as right of entry.

The last instruction seems to require, as evidence of adverse possession, some visible acts of ownership by the claimant in the preservation and use of the ground for burial purposes. And in that respect it was rather prejudicial to appellee.

As no error of law occurred prejudicial to appellant, and there is evidence to support the verdict, the judgment is affirmed.

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Darnell & Son, &c., v. Lewis.

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CASE 79—PETITION EQUITY—JUNE 6.

**Darnell & Son, &c., v. Lewis.**

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

**PREFERENCE OF CREDITOR.**—A mortgage executed by an insolvent debtor to an antecedent creditor with the design to prefer, operates as an assignment under the statute, although executed pursuant to a promise made at the time the debt was created.

**WILLSON & THUM FOR APPELLANTS.**

Brief withdrawn.

**JOHN C. RUSSELL FOR APPELLEE.**

A mortgage executed pursuant to a contract made at the time the debt was created is not a preference. (Brooks, Waterfield & Co. v. Staton's adm'r, 79 Ky., 174; Zaring v. Cox, 78 Ky., 527; Newby & Taylor v. Million, 2 Met., 530; Grover v. Smith, 5 Ky. Law Rep., 250.)

The case of McCutcheon v. Caldwell, 90 Ky., 249, distinguished.

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

The Cornell Wind Engine and Pump Company made a general assignment for the benefit of creditors. The lower court adjusted all the questions of attachments, priority of liens, &c., and all the parties are satisfied with the court's adjustment except its action in sustaining the appellee's mortgage, dated the 18th of October, 1890, upon the company's property, given by the company to secure a loan of four thousand three hundred dollars made by her to the company. The appellee loaned to the said company seven hundred and fifty dollars the 26th of August, 1890; seven hundred and fifty dollars October 4, 1890; seven hundred and fifty dollars October 10, 1890, and two thousand dollars October 18, 1890. On



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the latter date the company executed a mortgage to secure the whole sum loaned. The appellant contends, first, that as the mortgage to secure the payment of two thousand three hundred dollars was not executed simultaneously with the creation of said debt, the mortgage, as to said sum, comes within the provisions of the act of 1856, which declares that all mortgages, &c., made in contemplation of insolvency, and with a design to prefer one creditor over another, shall operate as an assignment of all his property for the equal benefit of all his creditors.

The appellee contends that she would not have loaned said sum to the company except upon the faith of a verbal agreement made with it at the time of the first loan, and repeated at every subsequent loan, that a mortgage should be executed to secure the loans as soon as the president of the company, who was then absent, should return home to sign the mortgage bonds, which were to be delivered to the appellee as security for the loans; that on the 18th day of October, the president, having returned, signed and delivered the bonds to secure the payment of the loan of two thousand dollars that day made, and the loan of two thousand three hundred dollars theretofore made. The appellee's contention is, that as the money was loaned upon the faith of the contract to thereafter execute a mortgage to secure its payment, and as it was executed pursuant to the contract and before the rights of third persons had intervened, the mortgage should be considered as relating back to the contract and as a part and parcel of it, and therefore binding.

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Now, the language of the act of 1856, in this connection, is significant. It is: "Nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage," &c. Now the statute speaks of a mortgage executed to secure a debt or liability created simultaneously with the execution of such mortgage. A promise at the time the debt or liability is created to execute a mortgage to secure its payment upon the happening of some particular event in the future, or at some particular time in the future, is not a compliance with the statute, *supra*; for the statute certainly means that the mortgage must be executed—not promised to be executed—to secure the payment of a debt or liability created simultaneously with its execution. The object of the statute was to prevent debtors, in contemplation of insolvency, from preferring one creditor over another by sale, mortgage or assignment of his property, but at the same time to give him a chance to recover from his embarrassment by allowing him to mortgage his property to secure a debt or liability simultaneously created. But the promise to give a mortgage in the future to secure a debt or liability that day created is not equivalent to the execution of a mortgage to secure the debt or liability simultaneously created.

The language of the statute means that the execution of the mortgage and creation of the debt or liability must be simultaneous acts. The promise to execute the mortgage in the future to secure a debt or liability that day made, is not a simultaneous act.

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It may never be executed. Besides, to substitute the promise to execute the mortgage for the act of executing, would allow a debtor, in contemplation of insolvency, to make the preferences that it was the object of the statute to prevent.

2. The weight of the evidence is that the mortgage was executed on the 18th day of October instead of the 12th of November.

The case of McCutcheon & Co. v. Caldwell & Son, 90 Ky., 249, takes up the cases of Brooks, Waterfield & Co. v. Staton's adm'r, 79 Ky., 174, and others referred to by appellee, and disposes of them consistently with this opinion.

The judgment is reversed as to the matter of two thousand three hundred dollars, and affirmed in all other particulars.

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CASE 80—PETITION ORDINARY—JUNE 8.

## Schweitzer v. Wagner.

## APPEAL FROM CAMPBELL CHANCERY COURT.

THE WIFE IS NOT ENTITLED TO DOWER in land of the husband sold to satisfy a lien created by mortgage in which she joined, a mortgage being a "deed" within the meaning of section 5, article 4, chapter 52 of the General Statutes.

## L. J. CRAWFORD FOR APPELLANT.

1. The appellant is not estopped by mere silence from asserting her claim. (Ballard's Real Estate Statutes, section 892; Story's Equity, vol. 2, section 1533; Martin v. Wurts, 1 Ky. Law Rep., 496; Connolly v. Branstler, 8 Bush; Wright v. Arnold, 14 B. M.; Arnold v. Stephens, 18 Ky. Law Rep., 628; Riggs v. Stephens, 18 Ky. Law Rep., 634; 26 Ala., 547; 11 Ohio St., 42; 47 Ohio St., 366.)

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2. Appellee is not entitled to be subrogated to the rights of the mortgagees. (Taylor v. Farmers' Bank, 10 Ky. Law Rep., 870; Sheldon on Subrogation, sections 11, 48, 50; Carter v. Goodin, 8 Ohio St., 75.)

**CRAWFORD & IRWIN AND GABRIEL HUBBELL OF COUNSEL  
ON SAME SIDE.**

**WM. LINDSAY FOR APPELLER.**

1. Appellee by his purchase was subrogated to the rights of the mortgagees.
2. As appellant was present at the sale and did not then assert her claim, she is now estopped to do so. (Wright v. Arnold, 14 B. M., 517; Davis v. Tingle, 8 B. M., 548; 1 Story's Eq., 377; Connolly v. Branstler, 8 Bush, 702.)

**JOHN S DUCKER ON SAME SIDE.**

1. Section 5 of article 4, chapter 52, Gen. Stats., applies, and precludes appellant from recovering dower. (Melone v. Armstrong, 79 Ky., 248.)
2. Appellant is estopped by her silence. (Bigelow on Estoppel, 2 ed., secs. 444, 446; Brothers v. Porter, *et al.*, 6 B. M., 118; Ringo v. Warder, *Idem*, 519; Wright v. Arnold, 14 B. M., 645; Markham v. O'Connor, 21 Am. Rep., 249; Davis v. Tingle, 8 B. M., 542; Connolly v. Branstler, 8 Bush, 702.)
3. Appellee is entitled to be subrogated to the rights of the mortgagees whose debts he paid. (Harris on Subrogation, sections 37, 38, 701; Jones on Mortgages, section 1395.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The appellant and her husband, at some time prior to 1876, conveyed, by way of mortgage, the real estate in which she now claims dower. In the year named, by proceedings in bankruptcy, the property was sold to satisfy the mortgage liens. It appears that there were, in fact, several mortgages, in all of which the wife joined, and expressly relinquished her inchoate right of dower. The property was sold for the amount of the mortgage debts, which was its full value as disclosed by the proof. The assignee in bankruptcy

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sold it as clear, free and unincumbered, and this was done, as the proof conduces to show, in the presence of the appellant, then the wife of the bankrupt, and without objection on her part or assertion of any claim. The husband died in 1879, and in 1886 his widow, now the appellant, instituted this action for dower in the property against the appellee, who was the purchaser at the assignee's sale in 1876. The chancellor dismissed her petition, and by her appeal the question is presented, whether she is entitled to dower.

Section 5, article 4, chapter 52 of the General Statutes, provides that the wife shall not be endowed of land sold to satisfy a lien or incumbrance created by deed in which she joins or to satisfy a lien for purchase money. But if there is a surplus of the land or proceeds of sale after satisfying the lien, she shall have dower or compensation out of such surplus, unless the surplus proceeds of sale were received or disposed of by the husband in his life-time.

It is urged by the appellee that by the term "deed" in this statute is meant "mortgage," or rather that the former embraces the latter, and that the appellant, having joined in the mortgage or deed creating the lien, to satisfy which the sale was made, is not endowed of the land. There is much plausibility in this construction. The intention certainly seems to be that if the wife joins in a conveyance creating a lien, and the land so encumbered be sold to satisfy it, she shall not be endowed thereof, but may have compensation out of the surplus, &c. A deed, in the ordinary sense of that term, is not what is meant

in the statute, as by it no lien is created against the grantors, to satisfy which a sale of the land can be made. A mortgage of land is a conveyance of it for the purpose of securing the payment of debt. It is a deed creating a lien, and seems to be the very instrument designated in the statute, in which, if the wife join, she is divested of dower, save in the surplus proceeds of the sale, if one be made to satisfy the lien so created. Such has been the construction of this statute in cases of sales for purchase money. In *Melone, &c., v. Armstrong*, 79 Ky., 248, it is said: "This statute evidently contemplated that a sale might be made by the husband, and that he might sell the whole or only so much as would satisfy the lien, but whether sold by the husband or under the judgment of a court, if the whole be sold *bona fide*, because there is a lien for the purchase money, and with a view to satisfy it in the manner deemed by the husband to be most beneficial to him, and with no design to deprive the wife of her potential right of dower, she will not be entitled to dower, although less than the whole would have satisfied the lien."

So it would seem if it be sold in good faith, because there is a lien for a debt created by a deed of mortgage, in which the wife has joined; and with a view to satisfy it, she should not be entitled to dower in the absence of any design to deprive her of her inchoate right. The statute makes no distinction between sales made under an order of court and those made by the owner; and liens for purchase money are placed in the same class with liens created by deed in which the wife joined. She oc-

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copies the same relation to the one class as to the other. In neither case has the husband or wife any beneficial interest in the lands not subordinate to the liens. In this case the lien consumed the property when sold at its full value, and moreover, the wife is shown, in the judgment of the chancellor, to have been present at the sale. There is a conflict of testimony on this point, but it appears reasonably well established that she was present when the property was offered for sale. The land was sold without reservation, with clear, free and unincumbered title. The sale included her interest. She stood silently by acquiescing in these announcements of the assignee in bankruptcy, doubtless in view of the fact that she had theretofore conveyed her entire right and interest. Her silence for more than seven years thereafter is consistent with this view, and we think it would be unjust and inequitable to allow her dower in the property at the expense of one who has paid its full value.

Judgment affirmed.

CASE 81—PETITION EQUITY—JUNE 10.

City of Louisville v. Muldoon, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **CONTRACT FOR CONSTRUCTION OF STREET—AGREEMENT TO KEEP IN REPAIR—PLEADING**—Where a contractor undertook by contract with a city to construct an asphalt pavement, and to keep it in repair for a term of five years from the completion of the work; the city to retain ten per cent. of the cost as security for the perform-

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ance of the contract to keep the street in repair, in an action brought at the end of the five years by persons who had succeeded by purchase to the right of the original contractor, seeking to recover of the city the ten per cent. retained, it was essential to the plaintiffs' cause of action that they should allege that the street was kept in repair as covenanted by the original contractor. It was not sufficient for them to allege that they were without knowledge or information sufficient to form a belief as to that matter, or that it was either kept in repair or was not kept in repair, and that they did not know which was true.

2. **SAME—PARTIES TO ACTION.**—A company which covenanted with plaintiffs to keep the street in repair was improperly joined as a defendant, there being no contract between that company and the city.
2. **TRANSFER OF SUITS.**—If there had been an issue made by the pleadings concerning the fact of the original contractor having kept the street in repair, it would have been the duty of the chancellor, upon motion, to transfer the action for trial by jury.

**H. S. BARKER FOR APPELLANT.**

1. The petition is fatally defective in failing to allege that the Barber Asphalt Company *did* the repairing called for by plaintiffs' contract. The alternative allegation is insufficient. (Civil Code, sec. 118, subsec. 4; *L. & N. R. Co. v. Coppage*, 7 Ky. Law Rep., 527.)
2. The replies of Messrs. Harris, Snyder and Muldoon are not sufficient, because they deny having knowledge or information sufficient to constitute a belief as to the allegations of the counter-claim of the city, whereas the facts alleged were such that plaintiffs were bound to know. (Civil Code, sec. 118, subsec. 7.)
3. The answer and counter-claim presented a defense which the defendant was entitled to have tried by jury, and the court should have transferred the case to the common law docket for that purpose. (*Meek v. McCall*, 80 Ky., 371; *Frazer v. Naylor*, 1 Met., 593; *Woodward v. Newcomb*, 12 Ky. Law Rep., 141; *Tisdale & Thiessen v. Reed*, 11 Ky. Law Rep., 98.)
4. The court erred in refusing to allow the city to file amended answer and counter-claim.
5. The material put down was not that called for by the contract, and was defective and worthless.

**T. L. BURNETT AND BARNETT, MILLER & BARNETT FOR APPELLEES.**

1. Allegations in the alternative are expressly authorized by the Code. (Civil Code of Practice, sec. 118, subsec. 4.)
2. The court will construe the pleadings to support the judgment below if possible. (*Ky. Lumber Co. v. Coxe*, 14 Ky. Law Rep., 148.)



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3. The court did not abuse its discretion in rejecting the amended answer. There is a large discretion as to allowing amendments. (*Louisville Underwriters v. Pence*, 14 Ky. Law Rep., 21; *Donnelly v. Pepper*, 18 Ky. Law Rep., 82; *Idem*. 384.)
3. Admissions in previous pleadings are conclusive. (*Wilborn v. Ritter*, 18 Ky. Law Rep., 128; *Newton v. Long*, 18 Ky. Law Rep., 698.)
4. The city engineer is a judge whose decision is final; when he says to the council "work is properly done, pay for it," then all are concluded, himself included.
5. Covenants are independent, if, by their terms, the time of performance of one is so fixed that it is to happen, or may happen, before the performance of the other. (5 *Lawson's Rights and Remedies*, sec. 2294, p. 8858.)

Under the contract the street was to be remade or reconstructed before the duty to keep in repair the work so made could begin. These covenants were, therefore, independent covenants. The covenant by two of plaintiffs to keep the street in repair for five years after its acceptance, was not the sole consideration of the covenants. The making of the street according to the specifications constituted the largest part of the consideration, "and it is a settled rule that when the plaintiff's covenant constitutes only a part of the consideration of the defendant's, and the defendant has actually received a partial benefit, and the breach on the part of plaintiff might be compensated in damages, an action may be supported against the defendant without averring performance by plaintiff." (*Payne v. Bettisworth*, 2 A. K. Mar., 788; 5 Mon., 387.)

## JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1883 T. P. Shanks, principal, and M. Muldoon and J. L. Smyser, sureties, made a contract with the City of Louisville for reconstruction of Third street by laying an asphalt pavement from Kentucky street to Shipp avenue, at a price per yard fixed, and payable upon monthly estimates during progress of the work, which was to be done according to plans and specifications of the city engineer, made part of the contract. One clause of the specifications is as follows: "Good and sufficient bonds to the City of Louisville, in a penal sum equal to the estimated amount of the contract, with sureties, to be approved by the

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mayor, will be required from all contractors, guaranteeing that their contract will be strictly and faithfully performed to the satisfaction of and acceptance by the mayor; *and that the contractors will keep new pavements or other new works in repair for a term of five years from the date of the completion of their contracts, and from that date ten per centum of the cost of all new work will be retained as an additional security and guarantee fund to keep the same in repair for said term; which said per centum will be invested in registered bonds of the United States, with interest thereon paid to said contractor.*"

February 11, 1890, M. Muldoon, Theodore Harris and J. L. Smyser brought this action in equity against the City of Louisville, T. P. Shanks, the Barber Asphalt Company, and Louisville Banking Company.

It is stated in the petition that soon after the contract was made the firm of T. P. Shanks & Co. was formed, composed of Shanks, Muldoon and Smyser, for the purpose of carrying out the contract in question, Harris very soon becoming also a partner; and that August 11, 1883, the work of reconstructing said street was completed by the firm, accepted by the City of Louisville, and final estimate of the cost thereof made by the city engineer and paid.

It is further stated that prior to commencement of this action the three plaintiffs purchased the interest of T. P. Shanks, and thereby became equitable owners of the ten per centum retained by the City of Louisville.

In respect to the covenant of T. P. Shanks and his sureties, Muldoon and Smyser, to keep said street in

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repair for the period of five years from August 11, 1883, when the work of reconstruction was completed, it is stated that about 1887 the firm of T. P. Shanks & Co. sold its plant and machinery to the Barber Asphalt Company, which undertook and agreed to keep in good order and repair the street for remainder of the term of five years, and to save the plaintiffs and Shanks harmless of damage arising from said covenant to the City of Louisville, and that the Barber Asphalt Company at once took charge of that part of Third street and its repairs, of which said city, through its chief engineer, was duly informed. An allegation in the petition that the Barber Asphalt Company did make some repairs on said street under direction of the city engineer and agents is followed by this statement: "But whether said Barber Asphalt Company did keep said pavement in good order and repair until the 21st day of August, 1889, as the said Shanks had been, by his contract, bound to do, plaintiffs do not know. *It is either true that said Barber Asphalt Company did so keep the same in good order and repair or that it did not. Whether it did or not, plaintiffs do not know. If so kept in good order and repair, then plaintiffs are entitled to the whole retained percentage with interest; and if not, then plaintiffs are entitled to and ask judgment against said Barber Asphalt Company for any sum that said city may show itself entitled to longer retain of said percentage.*"

In another part of the petition they pray judgment directly against the City of Louisville for amount of the several installments of interest that accrued on

the bonds mentioned, and interest on each installment, or equivalent thereof, in case the fund was not invested in bonds; also for nine thousand eight hundred and ninety-six dollars and fifty-six cents, being ten per cent. of the estimated cost of reconstructing the street, and interest thereon from March 1, 1889. The Barber Asphalt Company and the City of Louisville each filed a general demurrer to the petition, which was overruled as to both. Thereupon the Barber Asphalt Company filed an answer alleging performance of its contract with T. P. Shanks & Co., and praying simply for dismissal of the action as to it. The City of Louisville filed its answer, in which it is averred that neither T. P. Shanks, the firm of T. P. Shanks & Co., the Barber Asphalt Company, nor any other person kept the street in good order and repair during the period mentioned, but that it was, a long time prior to August 20, 1889, allowed to fall into decay and ruin, and became almost impassable, so that it will require at least twelve thousand dollars to put it in that state of repair. T. P. Shanks and his sureties covenanted to keep it in during said term of five years; and, making its answer a counter-claim against Muldoon and Smyser and cross-petition against Shanks, it prayed judgment for twelve thousand dollars in damages and dismissal of the petition. To that answer the plaintiffs replied merely that they did not know, or have sufficient information to form a belief, whether the street had been kept in good order and repair. But Shanks answered the cross-petition denying the allegations thereof. Afterward the City of Louisville moved for submission of the case to a jury for trial,

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but the chancellor overruled that motion, and, on final hearing, rendered judgment against the City of Louisville for amount claimed in the petition, at the same time dismissing the counter-claim and cross-petition, and also the action as to the Barber Asphalt Company. No judgment was rendered for or against Louisville Banking Company, nor does it appear to have any interest in the case.

The first question we will consider is, whether facts sufficient to constitute a cause of action against the City of Louisville are stated in the petition.

Whether the street was reconstructed as required by the contract does not appear to have been put in issue by the answer of the City of Louisville filed, nor do we think it is now an open question, for as that work was completed and final estimate of cost made and paid without objection, it must be regarded as having been accepted.

But besides the agreement to reconstruct the street, Shanks and his sureties, Muldoon and Smyser, covenanted to keep it in repair for five years, and according to terms of the contract, the City of Louisville had the right and did retain ten per cent. of the estimated cost of reconstruction, in the language used, "as an additional security and guarantee fund to keep the same in repair for said term."

That undertaking was made entirely distinct from the contract for reconstructing the street, which had necessarily to be completed and ended before the period of five years commenced. And it is clear a full, not partial, performance of it was intended by the parties to be a condition precedent of Shanks'

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right to demand and recover the ten per centum at the end of five years. Otherwise, retention of the fund by the City of Louisville for five years would have been without any use or purpose whatever.

Such conditions in contracts about public works are not unusual or unreasonable; in fact, they are in most cases necessary to secure full and faithful performance by contractors of their undertakings. Here the City of Louisville was going to make the experiment of constructing an asphalt pavement, about which neither the city engineer nor contractor appear to have had any practical knowledge. The work was to be very expensive, costing nearly one hundred thousand dollars, and in case the pavement proved insufficient for the purpose intended, by reason of either defective construction or failure to keep it in repair, loss to the city would be great and possibly total. For, as shown by the evidence, if cracks and holes in such pavement are not immediately and effectively repaired, rapid disintegration and decay begins, and before long a great outlay will be required to restore the street to a state fit for use.

If then, as we think is unquestionable, the right to demand and recover the ten per centum was intended by the parties to depend upon Shanks having kept or caused kept the street in repair during the period mentioned, it results that an allegation that condition was performed would have been indispensable in order to constitute a cause of action therefor against the City of Louisville, he being the plaintiff. And if so, we do not see by what process such allegation by the plaintiff

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iffs in this case can be dispensed with. For the right to Shanks' interest in the fund sued for was acquired by them, subject to all the conditions prescribed in the contract. Indeed, two of them were parties to that contract, and the other being a member of the firm of T. P. Shanks & Co. had full notice of the nature of it.

It is not alleged by plaintiffs in their petition that condition was complied with by Shanks or any person for him. Nor do they, in their reply, deny the statement made by the City of Louisville in its answer that he had failed to comply with it, their allegation being simply want of knowledge or sufficient information to form a belief concerning that matter. But the presumption is they did know whether the street had been kept in repair, for it was the contract duty of two of them, and interest of the other, to have it done, and consequently their reply must be regarded a mere evasion not tolerated by the Civil Code.

Section 114 makes it the duty of the court, upon or without motion, to compel parties before trial to form a material issue concerning each cause of controversy, and for that purpose they, or the one in fault, may be required to reform his or their pleading. But we have the case here of plaintiffs recovering judgment against a defendant, without alleging in their petition existence of the material and only fact upon which their action can be maintained, and actually evading an issue concerning that fact when tendered in defendants' answer. It is true Shanks denied he failed to keep the street in repair, but

he is not a party plaintiff in this action, nor has he any interest in the fund sued for, being merely defendant to the cross-petition, and interested in defeating recovery by the City of Louisville of damages in excess of the ten per centum.

It is, however, contended that the judgment of the chancellor, being supported by evidence bearing upon the main question, was authorized by subsection 4, section 113, Civil Code, which provides that "a party may allege alternatively the existence of one or another fact, if he states that one of them is true and that he does not know which of them is true."

That section has no application to this case, because there are not here two facts upon one or other of which plaintiffs may alternatively base their right of action, but only one; that is, the fact that Shanks kept or caused kept the street in repair for five years from August 23, 1884, as he covenanted to do, and in order to maintain their action it is necessary for them to allege and prove that fact. But the petition does not contain such allegation; nor have plaintiffs really alleged alternatively or otherwise existence of any fact at all; but they simply say that "it is either a fact or not a fact that the Barber Asphalt Company kept the street in repair; whether it did or did not, they do not know." And it was evidently their purpose to avoid stating whether the street was kept in repair, because if they had done so they would have been without a cause of action against either the Barber Asphalt Company or the City of Louisville. But there was no contract relation between the Barber As-



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phalt Company and the City of Louisville, and they were, therefore, improperly joined as defendants.

2. If there had been an issue made by the pleadings concerning the fact of Shanks having kept the street in repair, it would have been the duty of the chancellor, upon motion, to transfer the action for trial by jury; but it has never been in a state for trial, except of the general demurrer, which was improperly overruled, much less for judgment in favor of the plaintiffs against the City of Louisville.

For the errors indicated the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

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CASE 82—MOTION—JUNE 15.

Mengel Jr. Brother Company v. Jackson,  
Judge of Criminal Branch of Jeffer-  
son Circuit Court, &c.

**JURISDICTION.**—While a civil action can not be instituted in or transferred to the criminal branch of the Jefferson Circuit Court, the judge thereof may be empowered by statute, as has been done, to hear and determine, according to prescribed rules, a case pending in any other branch when the ends of justice require it.

THOMAS L. BURNETT AND AUGUSTUS E. WILLSON FOR C.  
C. MENGEL JR. BRO. CO.

1. This court has jurisdiction to issue the writ. (New Constitution, secs. 109, 110; Arnold v. Shields, 5 Dana, 18; Sasseen v. Hammond, 18 B. M., 372; Preston v. Fidelity, &c., Co., 22 S. W. Rep., 319; Patton v. Stevens, 14 Bush, 329; Pennington v. Woolfolk, 79 Ky., 21; Turnpike Co. v. Phelps, 81 Ky., 616; Shinkle v. Covington, 83 Ky.; Vance v. Field, 89 Ky., 178, 184.)
2. The Legislature can not, under the new Constitution, confer upon the

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criminal branch of the Jefferson Circuit Court power to try civil cases. (New Constitution, sec. 187; "An act concerning circuit courts having four judges," secs. 8, 10, 11.)

All directions of the Constitution are mandatory. (Varney v. Justice, 86 Ky., 600.)

**HELM & BRUCE FOR JUDGE JACKSON.**

Sections 10 and 11 of the "Act concerning circuit courts having four judges" do not violate any provision of the Constitution. Judge Jackson is a circuit judge, with all the powers of any other circuit judge in Jefferson county.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

It appears that September 19, 1892, the City of Louisville filed in the Jefferson Circuit Court, Law and Equity Branch, a petition praying for judgment determining whether C. C. Mengel Jr. Brother Company, and others made defendants to the action, will be damaged on account of the making by the plaintiff of a certain public improvement; if so, to what extent, and also that the right to erect and maintain that improvement is vested in plaintiff. But April 26, 1893, the following order was made: "The Hon. Sterling B. Toney, Judge of the Jefferson Circuit Court, Law and Equity Division, having this day announced that he could not properly preside in the above-styled action; thereupon, pursuant to rule No. 19, "Transfers," the clerk of this court determined by lot that this case be assigned to Common Pleas Division."

April 29, 1893, the plaintiff entered a motion for the court, Common Pleas Branch, to assign the action to an early day for trial, and in the event it can not be done, to transfer the action to the Criminal Division (Branch) of the court, to which motion defendants

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objected. But at a court held for the Jefferson Circuit Court, Common Pleas Branch, May 1, 1893, the following order was made: "This day came parties by counsel, and Hon. Wm. L. Jackson, Jr., Judge of the Criminal Division of the Jefferson Circuit Court, is requested to hear and determine this cause, to which defendants object and except."

The record shows this further order: "This action was set at rules in the clerk's office by plaintiffs on May 1, 1893, in the Criminal Division of the Jefferson Circuit Court, and at a court held for the Jefferson Circuit Court, Criminal Division, May 8, 1893, defendants filed a demurrer to the jurisdiction herein." On the same day defendants moved the court to remand the case to the rules of the Common Pleas Branch; but both the demurrer and motion were overruled, and the case assigned to June 10, 1893, for trial. And June 8, 1893, the defendant C. C. Mengel Jr. Brother Company filed in this court a petition praying for a writ directed to the Hon. Wm. L. Jackson, Jr., Judge of the Jefferson Circuit Court, Criminal Division, prohibiting him further hearing or determining the issues arising in the action mentioned.

In considering this application, the first question to be determined is, of course, whether Judge Jackson has authority to preside at trial of, and render judgment in, the action.

Section 11 of "An act concerning circuit courts having four judges," approved August 22, 1892, is as follows: "Any judge presiding over one branch of said court may, upon the request of a judge presiding over any branch of said court, hear and de-

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termine any cause or question in such other branch pending. The request shall be entered on the order-book of the branch in which such case or question is pending."

Although that section was clearly intended to authorize the judge of the criminal branch, as well as any other one of the four judges of the Jefferson Circuit Court, to preside in the condition thereby provided for, still it can not have that effect if contrary to the Constitution. The section of that instrument specially applicable to the Jefferson Circuit Court is 137, as follows: "Each county having a population of one hundred and fifty thousand or over shall constitute a district, which shall be entitled to four judges. \* \* \* Each of the judges in such district shall hold a separate court, except when a general term may be held for the purpose of making rules of court, or as may be required by law: Provided no general term shall have power to review any order, decision or proceeding of any branch of the court in said district made in separate term. There shall be one clerk for such district, who shall be known as the clerk of the circuit court. Criminal cases shall be under the exclusive jurisdiction of some one branch of said court, and all other litigation in said district, of which the circuit court may have jurisdiction, shall be distributed as equally as may be between the other branches thereof, in accordance with the rules of the court made in general term, or as may be prescribed by law."

Manifestly that section is not self-operative; and therefore proper and necessary legislation to make it

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effective was contemplated by the framers of the Constitution. For though four branches of the court are thereby provided for, power was left to the General Assembly to designate by name and provide for election of a judge to preside over each distinct branch; to regulate the jurisdiction and procedure of each; to prescribe the manner of making equal distribution of litigation between the three branches having civil jurisdiction, and of transferring cases from one to another; in a word, to enact all laws needed to secure administration of right and justice in each of the four branches without sale, denial or delay.

By section 13, power is expressly given to the General Assembly "to provide by law for holding circuit courts when, from any cause, the judge shall fail to attend, or, if in attendance, can not properly preside." In what particular manner and by what person a circuit court shall be held in the cases mentioned in that section, is left entirely in discretion of the General Assembly. And, consequently, plenary legislative power without doubt exists to authorize and require either of the four judges of the Louisville Circuit Court to hold the court of any one branch when, from any cause, the judge of that branch fails to attend, or, if in attendance, can not properly preside. There is, however, no express provision made in section 137 or elsewhere in the Constitution, for the judge of the Criminal Branch of the Jefferson Circuit Court, or indeed for either of the judges, to hear and determine a case pending in another branch, when, by reason of accumulation of cases, or for some other cause not mentioned in the Constitution, the judge of that

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particular court can not properly or promptly dispose of the litigation. But on the other hand, the Constitution does not expressly or impliedly prohibit the enactment of a statute authorizing and requiring a judge of one of the four branches of the Louisville Circuit Court to hear and determine a case pending in another branch, when, from any cause, the judge thereof may be unable to dispose of all the cases before him without unreasonable and expensive delay. So far from it, it would seem to be in harmony with section 137, and carrying out the purpose of it, for such division and equalizing of labor to be made when necessary for due and proper dispatch of litigation. Therefore, while a civil action can not be instituted in or transferred to the Criminal Branch of the Jefferson Circuit Court, the judge thereof may be empowered, as was done by the statute mentioned, to hear and determine a case pending in any other branch, according to prescribed rules, and when the ends of justice require it. Whether this court has power under the Constitution to issue a writ of prohibition in such case as petitioners contend for exists, is a question we need not now determine.

The writ of prohibition petitioned for is denied.

Elizabethtown, &c., Railroad Co. v. Ashland, &c., Street Railway Co.

CASE 88—RULE—JUNE 15.

Elizabethtown, &c., Railroad Company v. Ashland, &c., Street Railway Company.

APPEAL FROM BOYD CIRCUIT COURT.

1. **SUPERSEDEAS' OF JUDGMENT DISSOLVING INJUNCTION.**—When on final hearing an injunction has been dissolved, the execution by plaintiff of a supersedeas bond and the service of an order of supersedeas leave the injunction in full force, and the defendant is guilty of contempt if he disregards it.
2. **FINAL ORDER.**—As a judgment dismissing plaintiff's petition and dissolving his injunction disposed of all the issues in the case, it was final, although a counter-claim filed by defendant was not in terms disposed of.
3. **REINSTATEMENT OF INJUNCTION.**—When on final hearing an injunction is dissolved, the right to apply for reinstatement does not exist, although time be given for that purpose. The only remedy is by appeal.
4. **WHERE A RAILROAD COMPANY HAS ENJOINED A STREET RAILWAY COMPANY FROM CROSSING ITS TRACK** at a certain point, the fact that the plaintiff is about to construct an additional track at the point of the proposed intersection, and thus change the situation so that the defendant may not be able to enforce its judgment after it shall have obtained it, affords no justification for the defendant's plain violation of the order of injunction.
5. **SAME—CONTEMPT.**—The appellee, having constructed its road across the track of appellant at the point where it had been enjoined from constructing its road, is in contempt, and the only process of purging the contempt is to remove the obnoxious track.

WADSWORTH & COCHRAN, HUMPHREY & DAVIE AND H. T. WICKHAM FOR APPELLANTS.

1. The Kentucky rule (whatever it may be elsewhere) is, that where a preliminary injunction is issued, and it is by the final judgment dissolved, and an appeal is prayed, and the final judgment is "superseDED," the effect is to leave the preliminary injunction in full force pending the appeal. (Smith v. Western U. Tel. Co., 88 Ky., 279; K. & I. Bridge Co. v. Krieger, 91 Ky., 625.)
2. The fact that the court below, after dissolving the injunction and granting an appeal from that decision, went on to give the plaintiff twenty days' time to apply to the appellate court for a reinstatement,

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- did not change the rule. After the appeal was granted, the case was no longer in the lower court, and it could make no orders in the case. (*Prentice v. Wallis*, 87 Miss., 184; *Keyser v. Ferr*, 105 U. S., 266; *Lynn v. Carrick*, 15 Iowa, 445; *State v. Judge*, 36 La. Ann., 192.)
3. The provision of the Code authorizing the lower court to give time to apply to the appellate court for a reinstatement of injunctions, only applies to cases where the injunction has been dissolved upon a motion to dissolve, and does not apply to cases where the injunction is dissolved on final hearing. (*Pendergest v. Heekin, &c.*, 15 Ky. Law Rep., 180 (22 S. W. R., 605).)
  4. If there is a motion to dissolve, and that motion is not disposed of until the time of the final hearing, and the injunction is dissolved as a part of the action on the final hearing, it will be treated not as dissolved on motion so as to cause the provisions for a reinstatement to apply, but as dissolved by the final decree, so that an appeal and supersedeas will at once lie. (*Yocum v. Moore*, 4 Bibb., 221; *Pendergest v. Heekin*, 15 Ky. Law Rep., 180.)
  5. The claim (even if true) that the appellant is about to commit a wrong on the appellee, or that in the appellee's opinion, justice or public right requires it, will not justify appellee in ignoring the order of supersedeas and violating the injunction. (*K. & I. Bridge Co. v. Krieger*, 91 Ky., 633.)

**FAIRLEIGH & STRAUS AND KNOTT & EDELEN FOR APPELLEE.**

1. The court is earnestly asked to again consider the ground supporting the doctrine that a plaintiff may, by his act of superseding a final decree dissolving a preliminary injunction, continue the injunction in full force pending the appeal, and to overrule *Smith v. Western Union Tel. Co.*, 88 Ky., 269. (*Yocum v. Moore*, 4 Bibb., 221; 15 Ves. Jr., 184, *Summers'* ed.; 2 *High on Injunctions*, sec. 1709; *Wood v. Dwight*, 7 Johns. Chy., 295; *McMinnville R. Co. v. Higgins*, 7 Col., 217; *Mabry v. Ross*, 1 Heisk., 769; *Redman v. Redman*, 1 Tenn., 361; *Powell v. Parker*, 38 Ga., 647; *Garrow v. Carpenter*, 4 Stew. & P., 336 (Ala.); *Gregory v. Scofield*, 1 Hals. Ch., 525 (N. J.); *Brevort v. Detroit*, 24 Mich., 322; *Carrington v. Sweeney*, 2 McArthur, 68 (Dist. Columbia); *Slaughter House Cases*, 10 Wall., 273; *Harvey v. McDonald*, 109 U. S., 150.)
2. The judgment appealed from is not final for the purposes of an appeal. All the issues must be disposed of before the judgment is final. (*Freeman on Judgments*, secs. 20, 29-4, 34; *Black on Judgments*, sec. 24; *Am. & Eng. Enc. of Law, Titles, Judgments and Decrees*; 23 Wall., 420; 132 U. S., 207; 75 Texas, 82; *Ayers v. Carver*, 17 How.)
3. Are the appellants in a position to ask a court of equity to enforce an



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injunction for their benefit in view of their conduct in altering the physical condition of the tracks and road-bed at the point of intersection?

A party will not be heard in a court of equity to ask relief when he is himself at fault about the very matter about which he seeks relief. (Rapahe on Contempts, secs. 12, 21.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant, desiring to prevent the appellee from crossing its track at grade at a point south-east of Ashland, Kentucky, on November 2, 1892, filed its petition in the Boyd Circuit Court, and obtained an injunction appropriate for the purpose sought. After filing its answer and counter-claim, and giving notice of motion to dissolve the injunction, the appellee filed a general demurrer to the petition. It was sustained, as was also the motion to dissolve. The plaintiff declining to amend or further plead, its petition was dismissed, and a judgment for the costs of the action was rendered against it. From this judgment the plaintiff was granted an appeal to this court, where it is still pending. It executed in the office of the lower court a supersedeas bond, the force and effect of which on the order of injunction theretofore granted is the sole question on the motion now under consideration. The appellee, contending that the injunction was no longer in force, proceeded to construct its line of street railway across the track of the appellant at the point where it had been prohibited from building its line, doing its work in the night, and without the knowledge or consent of the appellant; hence this proceeding to punish the appellee for contempt. Therefore, as has been said, the question is as to the legal effect of the execution of the supersedeas bond with respect to the injunction.

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In the case of *Smith v. Telegraph Co.*, 83 Ky., 270, the precise question now under consideration was involved. It was held that when, on final hearing, an injunction has been dissolved, the execution of a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant is guilty of contempt if he disregards it. This doctrine was approved in the case of *Ky. & Ind. Bridge Co. v. Krieger*, 91 Ky., 625, and may be regarded as the well-settled rule in this State. Whether, therefore, the injunction be perpetuated or dissolved when the proceeding on the judgment is stayed by the execution of a supersedeas bond, as provided by the express language of the Civil Code (section 752), defining the supersedeas, the judgment itself, upon authority quoted, is suspended or stayed, and the parties stand as if it had not been rendered. The execution of the supersedeas bond and service of the supersedeas may be regarded as operating retroactively on the judgment rendered, rather than as reviving the dissolved injunction. It effects, therefore, not merely to stay proceeding on the judgment, but to suspend the judgment itself. Mr. High is thus quoted as announcing a contrary doctrine: "An appeal, being merely the act of the party, can not of itself affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer to exist. It follows, therefore, that an appeal from a decree dissolving an injunction can not have the effect of reviving the injunction, and of continuing in force, by the mere act of the party appealing, a judicial order which has been set aside." 2

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High, Inj., section 1709. Apparently, the learned author is considering the effect of an appeal merely on the order of injunction, and not the stay or suspension provided for by statutory regulation, such as we have seen exists in Kentucky. His language, "nor can it give new life and force to an injunction which the court has decreed no longer to exist," is certainly not applicable to a case where the very judgment which decrees "an injunction no longer to exist" is stayed or suspended by statutory regulation. The mere appeal of which the author wrote doubtless stayed future proceedings in execution of the judgment, but we must give broader effect to the stay provided for in our Code, and hold that the entire force of the judgment is stayed and rendered temporarily nugatory by the execution and service of the supersedeas, thus leaving the injunction where it was before the rendition of the suspended judgment.

It is contended, however, that the injunction was dissolved *pendente lite*, and the supersedeas issued on an interlocutory judgment; that, while final in form, the judgment was not so in fact. As we have seen, the defendant filed an answer and counter-claim. It is claimed that "the cardinal fact of plaintiff's petition was the impracticability of joint occupancy at the point of the proposed intersection, and the cardinal fact of the counter-claim was the converse of this averment;" that, therefore, the counter-claim not being disposed of by the judgment, the case to that extent is still pending, and the order sustaining the demurrer and dismissing the petition, with costs, is not a final order; that the supersedeas, therefore, was

issued imprudently, and is void; hence has no efficacy towards staying the judgment or reviving the injunction. The bare statement of this contention—and we have made it substantially in the language of the learned counsel for the appellee—carries with it its own answer. If the cardinal facts of the so-called “counter-claim” were the converse of the cardinal facts of the plaintiff’s petition, the pleading, which was in name a “counter-claim,” was in fact merely an “answer.” Certain it is that the dismissal of the petition disposed of all the issues in the case, and was, therefore, final. It does not occur to us, as is feared by counsel, that the issues were segregated, or that there is danger that they may not find their way together again.

It is said, however, that as the judgment of the dismissal and dissolution gave the plaintiff leave to apply for a reinstatement of the injunction, and continued it in force for twenty days after its rendition, the remedy was by such application, and not by the execution of the supersedeas bond. It seems clear to us that such a remedy was not open to the plaintiff. In *Pendergest v. Heekin*, 94 Ky., 384, it was distinctly held that when, on final judgment, an injunction is dissolved, the right to apply for reinstatement does not exist, but that the only remedy is by an appeal. But, say counsel for the appellee, the plaintiff is about to construct an additional track at the point of the proposed intersection, thus so changing the situation that the appellee may not be able to enforce its judgment after it shall have obtained it. It seems to us, however, that, while this may be a matter for future inquiry and regulation, it

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affords no justification for appellee's plain violation of the order of injunction. As to the appellee company and respondents Ringo, Wellman and Hughes, the rule is made absolute, and dismissed as to the other respondents. The only process of purging the contempt is to remove the obnoxious track placed at the point of intersection on the night of the 10th of May, 1893, which is now directed to be done by July 1st, next.

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CASE 84—PETITION EQUITY—MARCH 80.

## Craig v. Wilcox's Ex'or.

## APPEAL FROM KENTON CHANCERY COURT.

1. **SALE BY CHANCELLOR OF REAL ESTATE HELD IN TRUST FOR LIFE OF ONE PERSON WITH REMAINDER TO ANOTHER.**—Under the amendment of April 15, 1882, to title 10, chapter 14, Civil Code (Carroll's Code, p. 241), which provides for the sale by the chancellor of lands held in trust by one person for the life of another, with remainder over to persons not ascertained, or to be ascertained until the death of the life tenant, it is sufficient that the persons having a present or vested interest are before the court, and it matters not whether they are plaintiffs or defendants. Nor does this statute require the execution of any bond by guardian or committee.
2. **SAME.**—To authorize a sale under this statute, it is necessary to aver and prove facts showing the sale to be beneficial to all parties concerned.
3. **SAME.**—Where a testator by his will places property under the "control" of his executors, with power to them or to the "survivor" to pay the income to certain persons for life and then to their children, if they have any, the executors are to be regarded as trustees within the meaning of the statute providing for the sale of property held in trust for the life of one person, remainder to persons not to be ascertained until the death of the life tenant.

**ORLANDO P. SCHMIDT FOR APPELLANT.**

As the infant was not made a defendant, nor the action brought by her guardian, nor the bond executed by the guardian to the infant before

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the order of sale, the entire proceeding is void, and confers no title whatever upon the appellant. (Civil Code, secs. 491, 498; subsec. 5 of sec. 489; *Barnett v. Bull*, 81 Ky., 127.)

The amendment of April 4, 1882, published as part of sec. 498 of Civil Code, has no application.

**JAMES W. BRYAN FOR APPELLEE.**

1. The infant, being a non-resident without a statutory guardian, had the right to sue by her next friend. (Civil Code, sec. 36, subsec. 4; *Idem*, sec. 37.)
2. This action was not brought under either section 491 or 498 of the Civil Code, but under the amendment of April, 1882 (*Carroll's Code*, p. 241), and under that act no bond is necessary.  
*Barnett v. Bull*, 81 Ky., 127, distinguished.
3. The executor is a "trustee" within the meaning of the statute.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Jesse Wilcox, by his will duly probated in the Kenton County Court, provides for the payment of his debts, &c., out of that portion of his estate that is thereafter placed under the control of his executors, and the survivor or survivors of them, and which was not specially bequeathed to others. He confers on them and the survivor of them all other power and authority which he could give or confer in the premises, and all the power and authority which they needed in order to carry into full effect and execution, all and singular the provisions and purposes of his will, including the power to rebuild in case of damage or destruction by fire or otherwise, &c.

He instructed his executors to pay his widowed sister two hundred dollars annually during her lifetime. After providing for the payment of other specific sums to his nephews and nieces, he gave to his only daughter, Jesse, then a minor, a life interest in the remainder of his estate of every kind and de-

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scription, to have, hold and enjoy the *income* of the same during her natural life; if she married and was blessed with children, they were to enjoy the same with her. After the death of the daughter, then her children, if any, were to have the benefit and full enjoyment of the said life interest in equal proportions, until the youngest shall have reached its majority, when the entire property was to be divided among the surviving children. In the event of his child's death without issue, or without issue attaining the age of twenty years, then the judge of the circuit court where the home of his daughter was in her lifetime was to appoint a suitable agent or commissioner to sell the property and effects remaining, and pay the proceeds into court, less costs; and one-half the same was to be given the New Jerusalem Printing and Publishing Society, located in the city of New York, and the other half to his nephew and nieces, named theretofore, the latter to take life estates, with remainder to their children.

Crawford, one of the appellees, alone of the two executors appointed in the will, qualified. He took charge of the property, and since 1875 has controlled and managed it in pursuance of the provisions of the will. Finding the real estate in Covington unproductive, the houses becoming dilapidated and in need of expensive repairs, he brought this action in November, 1891, in conjunction with the daughter, Jesse Wilcox Wilson (she having married), and her husband; also Mildred Wilson, a minor, the child of Jesse Wilcox Wilson, who sued by her next friend, W. A. Crawford, and the nephew and nieces named as con-

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tingent remaindermen in the will of the testator, as plaintiffs, against the New Church Board of Publication, alias the New Jerusalem Printing and Publishing Society of New York, as defendant, setting up the provisions of the will, the unproductiveness of the realty under his control, and the beneficial results to be attained from the sale of the property, and the reinvestment of the proceeds in other and more productive estate. The chancellor granted the relief. The appellant Craig became the purchaser of one of the parcels sold, but resists a confirmation of the sale because of alleged irregularity in the proceeding. He insists that this is an action under section 491 of the Civil Code, providing for the sale of real property and the reinvestment of its proceeds; and as no bond was executed or other requirements of that section were complied with, the judgment of sale and the sale itself were absolutely void, and no title could pass to the purchaser; but we do not think that this was an action under that section, but one under the amendment of April, 1882 (Carroll's Civil Code, page 241), providing "that when lands are held in trust by one person for the life of another, with remainder over to a class of persons, or to any person not ascertained or to be ascertained, until the death of the person upon whose life such estate for life is made to depend, \* \* it shall be competent for the circuit courts or courts of like jurisdiction in the county in which such land or a part thereof is situate, in an action to which all persons having a present or vested interest in such land are parties, to direct the trustee to either sell or mortgage such land; but in



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such action it must be averred and proven to the court that such sale or mortgage would be beneficial to all the parties concerned, and facts showing such benefits must be 'alleged and proven,' and the deed or mortgage so executed "shall have the same effect as if executed by every person having a vested or contingent interest in or ownership of such land, and as if executed by all persons and classes who could take under the limitations or provisions of said deed, \* \* \* and as if every claimant, present or future, under such deed or power was under no disability."

It seems to us that the executor was a trustee. His duties were not merely to pay debts and legacies, but the body of the property was put under his "control" out of which he was to pay the income to the widow and child of the testator, and an annual sum to one of the legatees "during her lifetime." He appointed two executors, and expected them both to qualify, and upon the death of one, he continues the powers given to the "survivor," thus showing the permanency of the power and authority granted to carry into effect the provisions and purposes of the will, including power to rebuild the houses, &c. And the trustee held for the life of the daughter, Mrs. Wilson, with remainder over to a class—her children, if she had any, or if she had none or none reaching the age of twenty-one, then over to others. These were all parties to the action, and we think it matters not in this proceeding whether they are before the court as plaintiffs or as defendants.

This amendment requires the execution of no bond by guardian or committee, for the obvious reason that

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such fiduciaries do not get the proceeds of the sale. The provision being that "the proceeds of the sales authorized by this section shall be paid into court, and shall be reinvested by the court," &c.

It is necessary to aver and prove facts showing the sale to be beneficial to all the parties concerned, and this was alleged in this case and shown beyond question. The amendment of April, 1882, was a substantial re-enactment of the second section of an act amending chapter 86 of the Revised Statutes, approved February 16, 1858, and sales and reinvestments were upheld under that act in proceedings similar to the one now under consideration. (See *Paul v. Paul*, &c., 3 Bush, 484, and *Ewing v. Riddle*, &c., 8 Bush, 568.)

The case of *Barnett v. Bull*, 81 Ky., 127, relied on by the appellant, was under section 491 of the Code. We find no case determined under the amendment of April, 1882, but obviously the same construction should be adopted in considering it, as was adopted when the analogous section of the act of 1858 was considered and construed.

The appellant Craig gets a good title under his purchase, and the judgment to that effect is affirmed.

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Thompson v. Brannin, Brand & Glover.

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CASE 85—PETITION ORDINARY—APRIL 1.

## Thompson v. Brannin, Brand & Glover.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **SALES OF PERSONAL PROPERTY—PASSING OF TITLE.**—Under a contract for the sale of personal property, if any thing remains to be done by the vendor for ascertaining the weight or extent or price of property sold by him, whether the sale vests the right of property in the vendee presently or not until the thing has been done by the vendor for ascertaining the weight, extent or price of such property, depends upon the intention of the parties manifested by the character of the contract, or circumstances under which it was made; and the question may sometimes be determined by the custom of the trade in respect to a particular commodity.

In this action to recover the purchase price of tobacco which was destroyed by fire before it was delivered, it was competent for plaintiffs to show, in the absence of an express agreement between the parties in regard to manner of ascertaining net weight of the tobacco, that according to the custom of the tobacco trade, defendant, as purchaser was required to take it at the last ascertained weight, looking to plaintiffs to make good any loss or diminution.

2. **SAME**—Even if the title to the tobacco was according to a fair construction of the contract not to vest until the quantity of tobacco and certain amount of price were ascertained, it was so vested when those things were done by plaintiffs in the manner indicated.
3. **EVIDENCE—ORIGINAL ENTRIES.**—Independent of the provision of the Civil Code authorizing a person to testify for himself as to correctness of original entries, it was competent for plaintiffs to read to the jury from their warehouse books the original entries in reference to the alleged sale, and to exhibit the unsigned sale notes or invoices, for the purpose of showing they had complied with the conditions of the sale, or were ready to do so.
4. **INSURANCE BY WAREHOUSEMAN FOR BENEFIT OF PURCHASERS.**—Defendant was entitled to his *pro rata* share of the money collected on open policies of insurance which plaintiffs had obtained prior to their sale to him, and which were in force at the time the warehouse was destroyed by fire, as the policies were not only upon tobacco owned by plaintiffs, but upon tobacco "sold but not delivered."

WM. LINDSAY FOR APPELLANT.

1. The sale was not complete when the negotiations between the parties closed. (2 Addison on Contracts, sec. 568; 1 Benjamin on Sales, secs.

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- 865, 414-417; Newcomb-Buchanan Co. v. Cabell, 10 Bush, 467; Brown, &c., v. Childs, &c., 2 Duv., 814.)
2. A custom must be known to the party sought to be bound by it, or "it must be of such age, such uniformity of observance, such certainty and fixedness of character, and such notoriety that a jury would feel clear in saying that it was known to the party sought to be affected by it." (Kendall v. Russell, 5 Dana, 503; Huston v. Peters, 1 Met., 562; Caldwell, &c., v. Dawson, 4 Met., 126.)
  3. Since parties have been made competent witnesses their books, even when regularly kept, and books of original entries, can be used only for the purpose of refreshing their recollections. (Wharton on Evidence, sec. 679; Nichols v. Haynes, 78 Pa. St., 176; 1 Greenleaf on evidence, sec. 117; Brannin & Smith v. Foree's Adm'r, 12 B. M., 508.)
  4. It matters not how the question of the transmission of title may be settled, we have the fact that the 68 hogsheads were "not delivered," and, therefore, were covered by the insurance policies held by appellees.

## STONE &amp; SUDDUTH ON SAME SIDE.

1. Where a commodity has been sold by the pound, and the quantity and price are necessarily to be ascertained by weighing, the title does not pass to the buyer until the seller has actually weighed the commodity and thus ascertained the quantity and price, unless there is an express agreement between the seller and buyer that the title to the commodity sold shall pass before the weighing is done, and the quantity and price ascertained thereby. This principle was wholly left out of the instructions given by the court below, and was vital to the appellant in maintaining his defense. (Benjamin on Sales, sec. 319, p. 244; Jennings v. Flannagan, 5 Dana, 217; Withers v. Lyss, 4 Campbell, 287; Crawford v. Smith, 7 Dana, 59; Brown & Long v. Chiles, 2 Duv., 814; Story on Contracts, sec. 801; Parsons on Contracts, 441-6; Wells v. Maley, 6 Ky. Law Rep., 77; Nesbit v. Burry, 25 Pa. St., 208; Joyce v. Adams, 8 N. Y., 290.)

By statute in this State, the duty on the part of a seller who is a warehouseman to weigh tobacco after the sale, is made imperative, and not left to a mere stipulation in the contract. (Gen. Stats., p. 1265.)

2. If the title to the tobacco passed at all, it must be regarded as "sold but not delivered," and was, therefore, covered by the policies of insurance. (Home Ins. Co. v. Baltimore Warehouse Co., 98 U. S., 541-48; Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S., 324; Aetna Ins. Co. v. Jackson, Owsley & Co., 16 B. M., 242-258.)

## JOHN L. DODD FOR APPELLEES.

1. The title to the tobacco had passed. (2 Kent's Comm., pp. 658 *et. seq.*;

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- 1 Parsons on Contracts, 6th ed., p. 529; 1 Benjamin on Sales, sec. 819; *Idem*, secs. 418 to 485; Ferguson v. Northern Bank of Ky., 14 Bush, 563; Newcomb-Buchanan Co. v. Cabell, 10 Bush, 468; Brown & Long v. Chiles, 2 Duv., 320; Anthony v. Wade, 1 Bush, 110; Duncan v. Lewis, 1 Duv., 184; Crawford v. Smith, 7 Dana, 59; Leonard v. Davis, 1 Black, 483.)
2. Evidence as to the rules, regulations and customs of the Louisville tobacco trade was competent.

CHAS. S. GRUBBS, O'NEAL, JACKSON & PHELPS AND DODD  
& DODD OF COUNSEL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Brannin, Brand & Glover, tobacco warehousemen and factors in the city of Louisville, brought this action to recover of H. P. Thompson the price of sixty-eight hogsheads of tobacco, containing six thousand one hundred and seventy-five pounds, their individual property, alleged to have been purchased by him June 22, 1887, at eleven cents per pound, on a credit of four months, interest being added; also amount of buyer's fees at two dollars per hogshead, less salvage of four dollars per hogshead, the warehouse in which the tobacco was stored and its contents having been, June 24, destroyed by fire; and the appeal is from judgment against him for seven thousand three hundred and sixty three dollars and twenty-five cents, amount claimed, and interest from June 23, 1887.

It is stated in the petition substantially, that when said sale was made, exact amount of the purchase price had to be ascertained by procuring weights of the sixty-eight hogsheads, which plaintiffs did do on that day in this manner: Several months prior to said sale all the tobacco had been sampled and regularly inspected, and the weights ascertained and separately

entered on the books of plaintiffs; and on the morning of June 22, ten hogsheads of the sixty-eight had been again weighed and placed upon their brakes for auction sale, but withdrawn therefrom upon consummation of the sale to defendant and by his order.

That thereafter, on the same day, a number of other hogsheads of the lot of sixty-eight were again weighed for the purpose of seeing whether there had been any shrinking or increase of the original weights; and finding the weights of all the hogsheads so weighed on that day corresponded substantially with former weights, and being, by custom of the trade, guarantors of correctness of said weights, they did not actually weigh all the remaining hogsheads, nor were they required to do so by the contract with defendant nor by the custom of the trade; but they thereafter took the former weights, and therefrom made out the purchase price, together with memorandum and invoice notes of each hogshead, and charged amount of purchase price so ascertained to defendant upon their books, and placed all said tobacco in control and subject to the order of defendant; all which was done according to custom of the trade and in compliance with their contract with defendant.

The defendant, denying in his answer plaintiffs sold to him said tobacco, or that he agreed to pay them therefor, states that the samples thereof, except those of five hogsheads missing, were, by plaintiffs, on June 22, exhibited, and the tobacco priced to him at eleven cents per pound, net weight, all of which was to be re-weighed; that they proposed to wait four months for payment, taking his note for purchase price, and

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holding the tobacco in their warehouse, to be sold by them as commission merchants on his account as other tobacco shipped by him to them, and also retain a lien for the price thereof, and their fees, insurance and commission. But they then stated to him they could not weigh up said tobacco for several days, and that, without closing the contract, defendant expressed his willingness to take said tobacco at the price named and on the terms mentioned, provided he could inspect the missing samples, the tobacco could be weighed up, the net weights ascertained, and the invoice of the net weights and tare delivered to him.

He further states that, by law and custom of the tobacco trade in Louisville, it was the duty of plaintiffs to insure and keep insured tobacco in their warehouse for its full value, and the same was, on June 22, covered by policies of insurance for its value, or should have been. That after the warehouse and contents were destroyed, plaintiffs collected, or with reasonable diligence could have collected, the full value of said tobacco under policies of insurance thereon held by them. And he prayed that in case of judgment in favor of plaintiffs for amount claimed, he recover judgment over against them on account of said insurance for amount of full value of the tobacco on the day it was destroyed; his answer being for that purpose made a counter-claim.

The general rule, that as soon as a bargain of sale of personal property is struck, the contract becomes absolute, even without actual payment or delivery, and the property and risk of accidents vests in the buyer,

has been often sanctioned by this court. (Willis v. Willis, 6 Dana, 48; Buffington v. Ulen, 7 Bush, 231; Newcomb-Buchannon Co. v. Cabell, 10 Bush, 460.) "But if by the contract of sale any thing is to be done by the vendor for ascertaining the weight or extent or price of property sold by him, and there be no stipulation for passing the title before such thing shall have been done, then the law adjudges the right of property, as well as that of possession, to be in the vendor, until after he shall have ascertained the weight, extent or price of the property contracted to be sold. Thus a sale of tobacco at a fixed price per hundred weight, to be ascertained by weighing, will not constructively vest the right of property in the vendee until after the tobacco shall have been weighed, and the entire quantity and price of it thus rendered certain, according to the intention of the parties. But as soon as the weight of the tobacco shall have been properly ascertained, the property will, *eo instanti*, vest in the purchaser, even though he may not yet be entitled to the possession of it without paying the price, or assuming the payment of it according to the terms of the sale." (Crawford v. Smith, 7 Dana, 59.)

But whether a sale vests the right of property in the vendee presently, or not until the thing has been done by the vendor for ascertaining the weight, extent or price of such property, must of course depend upon intention of the parties, manifested by the character of the contract or circumstances under which it was made, and the question may be sometimes determined by the custom of the trade in respect to a particular commodity.



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Accordingly, in *Newcomb-Buchannon Co. v. Cabell*, where the question being as to title of a certain number of barrels of whisky sold but not re-gauged, the sale was decided to be absolute, and re-gauging to be done was merely to enable the parties to make a final adjustment of their accounts, the court holding it not to be true that in all cases of sales of personal property without delivery, the right of property remained in the vendor until the quantity is ascertained.

The defendant in this case substantially admits he agreed to take the tobacco upon the terms and at the price proposed by plaintiffs, with a reservation of the right to inspect the five missing samples, and proviso that the tobacco was to be weighed and invoice of the net weights delivered to him.

The plaintiffs, in their reply, deny there was such reservation in respect to the samples or agreement to re-weigh the tobacco, and both issues of fact were properly presented to the jury by instructions of the court, and found against the defendant. Moreover, the evidence shows that defendant had previously seen the lot of tobacco, and was well acquainted with all of it. And strong evidence he purchased the tobacco without such reservation is afforded by the fact of ten of the hogsheads prepared for auction sale that day being, at defendant's request, taken off the brakes and put back with residue of the lot of sixty-eight. And though the tobacco in question was individual property of plaintiffs and sold privately, it is manifest from the pleadings of both parties, the contract was made with reference to, and, as we

think may be fairly presumed, with knowledge by them of, the general and uniform custom of the tobacco trade in Louisville, and that they intended the transaction to be governed thereby, as if the tobacco had been sold by plaintiffs as commission merchants instead of owners, and at public auction instead of at private sale. Consequently, in absence of an express agreement between the parties in regard to the manner of ascertaining net weight of the tobacco, it was competent for plaintiffs to show that, according to such custom, defendant, as purchaser, was required to take it at the last ascertained weight, looking to plaintiffs to make good any loss or diminution, and duty of the court to instruct the jury upon that hypothesis, as was done.

It appears from the evidence that on the day of sale the net weight of each of the sixty-eight hogsheads and of all of them was ascertained, and entries thereof on the books of plaintiffs made, as well as invoices prepared ready for defendant, which latter, being in the nature of warehouse receipts, would have entitled him to delivery of the tobacco upon presentation of them. There, however, seems some discrepancy between the version of the parties respectively as to whether a note was to be executed by defendant for the tobacco as he contends, or whether, as stated by plaintiffs, there was an absence of any agreement in that particular, though they agree the tobacco was sold on a credit of four months. It does not, however, make any difference which version be true as regards the question of title to the tobacco; for plaintiffs would have had a right to protect themselves in case of non-payment of the purchase price.

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But counsel contends it was not competent for plaintiffs to read to the jury extracts from their warehouse books, showing the original entries on June 22, in reference to the alleged sale, nor to exhibit the unsigned sale notes or invoices of the same date. It seems to us, independent of subsection 7, section 606, Civil Code, authorizing a person to testify for himself as to correctness of original entries, it was competent for plaintiffs to show in that manner they had complied with the conditions or terms of the contract of sale required of them, or were ready to do so.

It seems to us clear that the parties intended the transaction to be an absolute sale of the tobacco, and defendant was thereby vested with title to the property. But even if the title was, according to fair construction of the contract, not to vest until the quantity of tobacco and certain amount of purchase price were ascertained, it was so vested when those things were done by plaintiffs in the manner mentioned. It was error in the court to permit witnesses to give their opinion as to the legal effect of what occurred between the parties, as it was to instruct the jury to find whether plaintiffs had done all that it was material for them to do by the terms of the contract.

Although we think the evidence in this case shows a sale of the tobacco was made and title was thereby vested in the defendant, and he was entitled to his pro rata share of the money collected on open policies of insurance which plaintiffs had obtained prior to their sale to defendant, and were in force at the time the warehouse was destroyed by fire, the amount of

which, it appears, was forty-five thousand dollars; for, in language of the several policies, the insurance was obtained by plaintiffs on "tobacco in hogs-heads, their own, or held by them on account of others, when they are legally liable, or sold but not delivered, contained in their metal-roof brick warehouse." Whether the tobacco in question was such as plaintiff was legally liable for or not, it certainly was tobacco "sold but not delivered" in meaning as well as language of the different policies; for that tobacco, though sold, had not been delivered either constructively or actually, and according to the contract as interpreted by plaintiffs themselves they could not deliver it until the weights were ascertained, and invoices and notes made out and tendered to defendant; nor were they bound to deliver it until payment of the purchase price or execution of a note therefor by defendant.

Wherefore, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

CASE 86—INDICTMENT—JUNE 10.

## Roberts v. Commonwealth.

APPEAL FROM BREATHITT CIRCUIT COURT.

1. THE DEFENDANT WAS NOT PREJUDICED BY THE REFUSAL OF THE COURT TO GRANT A CONTINUANCE, asked because of the absence of a witness, who, if present, would have sworn that defendant was of unsound mind, there being other witnesses present who did so testify, and the affidavit for a continuance, so far as competent, being read to the jury as evidence.

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2. **IRREGULARITY IN THE FORMATION OF THE JURY, OR IN THE MODE OF SUMMONING IT,** can not be shown by affidavit of the defendant, there being a record easy of access disclosing the facts. And where it appears that the jury was summoned by the sheriff and not by the jury commissioners, it is to be presumed that he performed this service under order of the court as provided by section 11 of article 4, chapter 62 of the General Statutes.
3. **EXCEPTIONS.**—Decisions of the court upon challenges to the panel and for cause are not subject to exception.
4. **THE MANNER IN WHICH THE JUDGE IS TO SATISFY HIMSELF OF THE IMPRACTICABILITY OF OBTAINING A JURY FREE OF BIAS IN THE COUNTY** wherein a prosecution is pending is by making a fair effort to obtain the jury in that county. He can not be controlled and guided by the unsupported affidavit of the defendant.
5. **PERSON OTHER THAN SHERIFF APPOINTED TO SUMMON JURORS.**—The court did not err in designating two persons other than the sheriff to summon petit jurors after the regular panel was exhausted, such a practice being authorized by section 193 of the Criminal Code.
6. **STATEMENT OF CASE FOR COMMONWEALTH.**—It was not error to permit an attorney, other than the regular attorney for the Commonwealth, to state to the jury the nature of the charge against the defendant.
7. **THE FACT THAT ONE OF THE WITNESSES FOR THE COMMONWEALTH HEARD THE STATEMENT OF THE CASE** is not ground for reversal, the attention of the court not being called to the presence of the witnesses.
8. **EVIDENCE—PREJUDICIAL ERROR.**—It was improper to allow a witness to testify as to inducements offered him by one of defendant's relatives and witnesses to testify for defendant, but, as he was not present at the killing, and could have known nothing touching which he could have sworn for defendant material to his defense, the testimony was not prejudicial, as it is not to be presumed an intelligent jury would hold defendant responsible for the supposed imprudences of his friends, especially when they appear incredible and absurd on their face.
9. **SAME.**—The Commonwealth having been allowed, without objection, to prove by a witness for defendant that he was under indictment for perjury, it was competent for defendant to prove by the witness that the indictment had been procured by the relatives and friends of deceased who were prosecuting defendant; but as the indictment for perjury grew out of the testimony of the witness on a former trial of the case being tried, and all the testimony on the subject-matter of the alleged perjury was heard by the jury, they were in an attitude to judge of the weight to be given the pendency of the indictment as affecting the credibility of the witness, and, therefore, defendant was

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not prejudiced by the refusal of the court to allow the witness to state by whom the indictment for perjury had been procured.

10. **SENDING JURY TO VIEW GROUND.**—Whether the jury should be sent to view the ground was a matter within the sound discretion of the court.

**J. J. C. BACK, R. A. HURST, J. B. MARCUM AND W. W. VAUGHN FOR APPELLANT.**

1. As the indictment does not charge that the killing was done with "malice aforethought," it only charges manslaughter, if any thing, and it was error to give an instruction as to murder. (*Kaelin v. Commonwealth*, 84 Ky., 364; *Kennedy v. Commonwealth*, 14 Bush, 340; *Wharton's Criminal Law*, sec. 517.)
2. The indictment is also defective because it does not contain such statements as show that the deceased died from the wounds inflicted within a year and a day. (*Wharton's Criminal Pl. & Pr.*, sec. 188; *Wharton's Crim. Law*, sec. 812.)
3. The court erred in refusing a continuance (*Morgan v. Commonwealth*, 14 Bush, 106.)
4. The presence of his witnesses was important to defendant, and the fact that a part of the affidavit for a continuance was read as the deposition of the absent witnesses did not prevent the error in refusing a continuance from being prejudicial. (*Nichols v. Commonwealth*, 11 Bush, 578.)
5. The court erred in refusing to order a jury to be summoned from another county, it being shown that an impartial jury could not be had in the county.
6. The court should have sustained the challenge to the entire panel of the jury, upon the ground that the deputy sheriff who summoned the jury was a cousin of the deceased, and actively engaged in the prosecution of the defendant.
7. It was error to permit an employed attorney, especially when he was the circuit judge, to state the case for the Commonwealth. The case should have been stated by the regular Commonwealth's attorney, or, in his absence, by an attorney appointed by the court. (*Criminal Code*, sec. 220.)
8. The statement of the case for the Commonwealth in the presence of principal witness for the prosecution was prejudicial to defendant.
9. Defendant was entitled to have his attorney state his case to the jury immediately after the statement of the case for the Commonwealth. While defendant has the right under section 222 of the Criminal Code to wait until the evidence for the prosecution is closed before stating his case, he is not compelled to do so.
10. The court erred in admitting incompetent evidence, and for this error there should be a reversal. This court can not speculate on the effect of such evidence. (*Kennedy v. Commonwealth*, 14 Bush, 340.)

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11. Collateral facts brought out on cross-examination of a witness are conclusive against the party calling for them. (*Kennedy v. Commonwealth*, 14 Bush, 840; *Loving v. Commonwealth*, 80 Ky., 507.)
12. The court erred in allowing Robert Frazier to testify to a confession made by Ransom Roberts in the absence of defendant, the alleged conspiracy not being proved. And even if both parties had been on trial, the testimony of Frazier would not have been competent unless accompanied with an admonition from the court that it could not be considered against the defendant. (*Cable v. Commonwealth*, 14 Ky. Law Rep., 258.)
13. The trial court abused its discretion in refusing to send the jury to view the ground where the killing occurred. (*Crim. Code*, sec. 236.)
14. The court erred in appointing as elisor one who had stated that the defendant ought to be hanged.

**WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

1. The defendant was not prejudiced by the refusal to grant him a continuance, as the relevant and competent testimony set out in the affidavit for a continuance the court permitted to be read as evidence for the defendant.
2. The challenge to the panel was not made in accordance with the Criminal Code, and even if it had been, the grounds stated were not sufficient to discharge the panel.
3. While the court had no authority to appoint an elisor, there being no vacancy in the office of sheriff, (*Gen. Stats*, chap. 34, secs. 1 and 2), yet the court had the authority for a sufficient cause to designate some other officer or person to summon the jurors. To this extent his order was valid. (*Crim. Code*, sec. 198.)
4. There was nothing improper in the action of the court in allowing the regular circuit judge, who had been employed to prosecute before his election, to state the case to the jury.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

On a former trial of this case, a demurrer to the indictment was filed and overruled. On an appeal to this court, the ruling of the lower court in this respect was approved, and the sufficiency of the indictment will not again be considered. The appellant, for the second time convicted of murder and sentenced to confinement in the penitentiary for life, complains on this appeal:

First. That he was not granted a continuance. No absent witness could throw any light on the killing with which he was charged, but would testify, it is said in the affidavit, to the unsoundness of defendant's mind. There were other witnesses present who did so testify, and the affidavit for the continuance, so far as competent, was read to the jury as evidence.

Secondly. It is urged that the court erred in overruling his challenge to the panel of the jury summoned for that term of court. No record evidence of how the panel was obtained was offered, but the affidavit of the defendant contained the statement that it was not selected by jury commissioners but by the sheriff and his deputies, all of whom are alleged to be taking an active part in the prosecution of the defendant. This was not the proper way to show irregularity in the formation of the jury or in the mode of summoning it. There was a record, easy of access, disclosing the facts. It does not appear when the panel was summoned; it is to be presumed that the sheriff performed this service under the order of court as provided by section 11 of article 4, chapter 62 of the General Statutes. Moreover, it is distinctly provided by section 281, Criminal Code, and oftentimes so announced by this court, that decisions of the court upon challenges to the panel and for cause shall not be subject to exception.

In this connection we may notice the motion of the defendant to have the jury summoned from an adjoining county. His affidavit discloses that the prosecutors are people of influence, and are using money to



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secure his conviction. Section 194, Criminal Code, provides: "If the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed." The manner of satisfying himself of this impracticability is by making a fair effort to obtain the jury in the county wherein the case is pending, and certainly the court is not to ignore the plain provisions of the Code, and be controlled and guided by the unsupported affidavit of the defendant.

After the regular panel was exhausted, the court, under section 193, Criminal Code, designated two other persons to summon petit jurors, who were duly sworn. This was objected to by the defendant, but we perceive no error in thus following the provision of the law cited.

An attorney, other than the regular attorney for the Commonwealth, stated to the jury the nature of the charge against the defendant. We see no error in this, nor in the fact that one of the witnesses for the Commonwealth is shown to have heard the statement. The court no doubt would promptly have required his retirement had his attention been called to the fact of his presence.

We have examined the rulings of the court care-

fully in admitting and rejecting testimony, and find no error prejudicial to the substantial rights of the defendant. The nearest approach to it perhaps was in not allowing the defendant to prove by Ransom Roberts that the friends of the deceased had procured an indictment for perjury against the witness in order to discredit his testimony. The Commonwealth had been allowed, but without objection by defendant, to ask the witness if he was not under indictment for perjury. He answered affirmatively. Whereupon the defendant asked him who procured the indictment, an objection to which was sustained, and it was then avowed that the witness would prove that Shearman Cope and other relatives and friends of the deceased, who were prosecuting the defendant, had procured the indictment against the witness. This evidence was competent as tending to explain away the discrediting circumstance of the indictment. But it appeared that the indictment was found for perjury in the very case then on trial, and growing out of the testimony of the witness on a former trial. The testimony, therefore, involving the alleged perjury, and upon which the indictment was found, was all before the jury in the case on trial. The statements of the witnesses for the Commonwealth establishing the alleged false swearing on the part of the witness, together with the testimony of the witness alleged to have sworn falsely, were all before the jury. The testimony, therefore, pro and con on the subject-matter of the alleged perjury, was heard by the jury. They understood all the circumstances, and were in an attitude to judge of the effect and weight to be

given the testimony of the witness in defendant's behalf, as affected, if at all, by the pendency of the indictment against him.

John Frazier was allowed to prove that Obe Roberts, a witness for the defendant and a relative, had said to him after the killing, and not in the presence of the defendant, that if he (witness) would swear for the defendant, that he (Roberts) would help him out of a certain indictment against him. This was irrelevant and incompetent testimony, but not prejudicial. It abundantly appeared from the proof that Frazier was not present at the killing and could have known, therefore, nothing touching which he could have sworn for the defendant material to his defense. An intelligent jury would not hold the defendant responsible for the supposed imprudences of his friends, especially when they appear incredible and absurd on their face.

The facts testified to for the defendant by Ransom Roberts, and allowed to be contradicted by Centers and others for the Commonwealth, were not collateral but substantive facts. They involved the manner of the killing and the attitude of the parties at the time of the homicide. It was not error to permit the contradictory testimony, nor was it improper to allow Robert Frazier to testify to the statements of Ransom Roberts respecting his intentions on the day of the killing. These intentions involved in no way the action or conduct of the accused, were not made with reference to him, and were competent only so far as this might affect the credibility of the witness. We think that the lower court allowed defend-

Doores, &c., v. Varnon, &c.

ant's counsel every opportunity that was reasonable to present their testimony, and Hopson's proposed testimony came too late.

Whether the jury should be sent to view the ground was a matter within the sound discretion of the court. There appeared to be no complication in the testimony regarding the topography of the country where the killing occurred.

Upon the whole case, as it appears of record, we are of opinion that the defendant had a fair and impartial trial, and the judgment is, therefore, affirmed.

CASE 87—PETITION EQUITY—JUNE 13.

Doores, &c., v. Varnon, &c.

APPEAL FROM LINCOLN CIRCUIT COURT.

**ELECTION TO TAKE SENSE OF VOTERS AS TO IMPOSITION OF TAX—MANDATORY PROVISION OF STATUTE**—Where an act of the Legislature which provided for taking the sense of the voters of the district upon the question of imposing a tax for a specific purpose, provided that the county judge, "upon a written petition signed by at least ten legal voters who are tax-payers," should make an order in his order-book "at the next regular term of his court after he receives said petition," directing the sheriff to open a poll, etc, the provision fixing the term of court at which the order should be made, was mandatory, and an election held under an order made by the county judge at the same term of court at which the petition was filed was void.

**MILLER & OWSLEY FOR APPELLANTS.**

The direction that the order of the county judge shall be made at the next regular term of his court after he receives the petition is mandatory, and not being complied with in this case, the order is void. Directions concerning the exercise of a delegated power to tax, have been universally held to be mandatory, and must be strictly complied with. (Bowling Green, &c., R. Co. v. Warren County Court, 10

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94	507
99	223
94	507
103	452
103	453
94	507
106	22

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Bush, 724; Campbell County Court v. Taylor, 8 Bush, 208; Cooley on Taxation, 257; Dillon on Mun. Corp., p. 104, note.)

**W. G. WELCH FOR APPELLEES.**

The provision of the act fixing the time for making order is directory merely. (Sedgwick on Construction of Statutes, 317, 328.)

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

It is only necessary to refer to one of the grounds relied on for a reversal of the judgment below. A tax was voted to create a graded school district within a certain boundary, including the town of Crab Orchard, in the county of Lincoln. The first section of the act under which the vote was taken makes it the duty of the county judge, "upon a written petition signed by at least ten legal voters, who are tax-payers in any civil district, town or city in his county, to make an order on his order-book, at the next regular term of his court after he receives said petition, fixing the boundary of any proposed graded free school district, \* \* \* \* directing the sheriff to open a poll, \* \* \* \* for the purpose of taking the sense of the legal white voters \* \* \* upon the proposition" whether or not they will vote an annual tax for the maintenance of the school, &c. See the act approved on May 4, 1888.

On the fourteenth of September in the year 1891, it being the regular term of the Lincoln County Court, a petition, purporting to be signed by the proper number of legal voters and tax-payers, was presented to the county judge and filed. On the same day the petition was filed or presented to the county judge an order was entered directing the sheriff to open a poll on the seventeenth of October, 1891, for the pur-

pose of sustaining or rejecting the application made for this tax as provided by the act in question.

The tax having been voted, some of the tax-payers obtained an injunction enjoining its collection, on the ground that the order calling the election was premature, and, therefore, void. The statute in plain terms empowers the county judge to make an order for the election at *the next regular term after he receives the petition*, and from this enactment the right to impose the tax alone arises. The recognized rule is, in cases of this character, where the power to impose the burden is delegated to others upon the result of a popular vote, that the act conferring the power must be strictly complied with, and the question arising in this case is: "Is the power given the county judge to enter an order for the election at a term succeeding the filing of the petition merely directory or is it mandatory?"

The Legislature, doubtless, had some reason for postponing the entry of the order to a subsequent term, and the county court being a court of record, the application made to the county judge and filed was notice to the tax-payers of the purpose of the petitioners to submit the question of taxation to the popular vote. The postponement of the order to a subsequent term gave additional time for considering the question, and enabled those who were interested to ascertain whether those making the application were legal voters or tax-payers, and it being in the nature of an *ex parte* proceeding, the greater the necessity for giving to the voter all the time provided by the statute for considering such questions as might

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arise from the nature of the application. We are constrained, therefore, to hold that as the act authorizing this tax requires the order for the election to be made at a term succeeding that at which the petition is made, it must be regarded as mandatory.

The judgment dissolving the injunction is reversed, and cause remanded with directions to overrule the demurrer and for proceedings consistent with this opinion.

# DECISIONS

OF 1893

## COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1893.

CASE 88—INDICTMENT—SEPTEMBER 9.

Scott v. Commonwealth.

APPEAL FROM BATH CIRCUIT COURT.

1. **EVIDENCE — CONFIDENTIAL COMMUNICATIONS FROM HUSBAND TO WIFE.**—A letter written by a husband to his wife while he was confined in jail upon a charge of murder is to be regarded as a confidential communication, and, therefore, not competent against him upon the trial to break the force of his and other testimony tending to show that deceased and his wife were criminally intimate, and that he committed the homicide in a state of passion and excitement caused by belief that such was the fact. And it is not material whether the letter was given up by the wife voluntarily or was obtained against her will. Nor does the fact that defendant admitted, on cross-examination as a witness, that he wrote the letter and identified it legalize the evidence, inasmuch as he was required by the court over his objection to answer questions relative to the letter propounded by the Commonwealth.
2. **PREJUDICIAL ERRORS.**—Although the defendant was found guilty of manslaughter only, the error in admitting the letter as evidence was prejudicial, as it may have influenced the jury in fixing the punishment.

SMOOT & GUDGELL FOR APPELLANT.

1. The letter from the husband was confidential and privileged, and, therefore, not competent evidence against the husband. (Civil Code.

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e118	15
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e123	333
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132	783



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Scott v. Commonwealth.

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sec. 606; McGuire v. Malony, 1 B. M., 224; Elswick v. Commonwealth, 18 Bush, 155; Selden v. State, 74 Wis., 271; s. c., 17 Am. St. Rep., 144; 1 Greenleaf, secs. 884, 887, 842; 2 Russell on Crime, 981-6.)

2. The instruction as to manslaughter was erroneous. The ordinary manslaughter instruction does not fit a case where a husband in a transport of passion slays the seducer of his wife. (Nichols v. Commonwealth, 9 Bush, 566; Campbell v. Commonwealth, 88 Ky, 402.)

WM. J. HENDRICK, ATTORNEY-GENERAL, AND C. W. GOODPASTER FOR APPELLEE.

1. The court properly refused the instructions asked for, conceding the strongest view that could be taken of it for the appellant, he must, in order to render his act excusable, have been the witness to the condition of affairs between his wife and Swartz, which he feared. (Blackstone's Comm. Book 4, sec. 191.)
2. The letters from the defendant to his wife were competent evidence in view of the excuse given by him for the killing.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The evidence in this case of witnesses present shows that about, or soon after, night-fall, appellant went through the back door into the store-house of deceased, situated in a village where they both resided, and, without other warning than simply pronouncing the given name of deceased, commenced to fire his pistol at and killed him, so that, although deceased fired also very soon after appellant's first shot, and both continued to fire until as many as seven or more shots were exchanged, there is no ground whatever upon which to base the excuse of self-defense. The jury, however, found a verdict of manslaughter only, fixing punishment at confinement in the penitentiary sixteen years.

We perceive no error in instructions to the jury, and the single inquiry left is, whether the court erred in permitting read in evidence a letter which appel-

lant, while confined in jail, wrote to his wife. Appellant, on being cross-examined as a witness in his own behalf, admitted he wrote the letter, and identified it. But that does not seem to us to legalize the evidence, if not otherwise competent, inasmuch as he was required by the court, over his objection, to answer questions relative to the letter propounded by the Commonwealth. He testified on the trial that he committed the homicide in a state of passion and excitement, caused by belief his wife and deceased were criminally intimate; that his suspicion was aroused by their conduct at the railroad depot in Mt. Sterling the day before, when they were together, as he believed, by pre-arrangement; that after their return home, and on the day of the killing, he sought an interview with deceased at his store-house, and, as other witnesses also testify, harsh language passed, or rather was used by appellant; that, being harassed with suspicion, he asked his mother, who lived at his house, if she believed his wife was unfaithful, and the affirmative answer to his question, and his mother's statement that about one week previously she had seen his wife and deceased together at night, and under circumstances showing they were guilty, caused him to seek deceased and take his life.

In addition to the information given to appellant by his mother, the correctness of which she swore to on the trial, other witnesses testified to conduct on various occasions of deceased and appellant's wife inconsistent with their innocence, and from which the jury was authorized to infer they had been criminally intimate.

Although manslaughter is an offense in every case without legal excuse, still it is the policy of the statute to vary the punishment, so as to suit circumstances of aggravation or extenuation as the case may be, and hence the margins fixed are not less than two nor more than twenty-one years. It thus becomes a substantial error of court to permit incompetent evidence to go to the jury, the natural effect of which is to either increase or lessen the punishment that would be otherwise inflicted. An invasion of marital rights by a seducer or adulterer is always treated as a great provocation, and juries are prone to palliate the offense and lessen the punishment of a party who takes the wrong-doer's life under sudden heat and passion induced thereby. The letter in question, we need not quote it, does not contain an admission in terms that appellant then believed his wife innocent of wrong-doing with deceased, but does contain expression of affection for and desire to see her. It seems to us the natural effect of that letter upon minds of the jury, and from the severity of punishment inflicted the actual effect, was to lessen or break the force of other testimony tending to show the guilt of the deceased, and thereby deprive appellant of that extenuating fact. If, therefore, it was error to admit the letter as evidence, it must be treated a reversible error.

The rule excluding husband and wife testifying for or against each other in a criminal prosecution, except in case of personal injury by one to the other, is, as stated in Greenleaf on Evidence, vol. 1, section 334, founded partly on the identity of their legal

rights and interests and partly on principles of public policy which lie at the basis of civil society. "For it is essential to the happiness of social life that the confidence subsisting between the husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence."

In *Elswick v. Commonwealth*, 13 Bush, 155, this court, citing as authority *Greenleaf on Evidence* and *Philips on Evidence*, uses this language: "Information coming to a husband or wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations can not be broken even after that relation has been dissolved."

In *McGuire v. Maloney*, 1 B. M., 224, it was to the same effect held that policy of the law so far protects that privacy and confidence essential to the marriage relation and that necessarily spring from it, as not only not to allow, but prevent, even after termination of the coverture, any disclosure by the wife in a court of justice, which implies a violation of the confidence which was reposed in her as a wife.

The evidence in this case shows the letter in question was procured from appellant's wife by a brother of the deceased, and thus came into possession of the Commonwealth's attorney. But it seems to us, whether given up by her voluntarily or obtained against her will, it was a disclosure of what had

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Scott v. Commonwealth.

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been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband in this case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in confidence and privacy of the marriage relation.

The case of *Selden v. State*, 74 Wisconsin, 271, was a prosecution of a person for perjury, who, in a proceeding against his wife for divorce, made affidavit he did not know her place of residence; and the question on the trial was, whether letters written by him to her pending proceeding for divorce, showing he did know her place of residence, and which she had placed in possession of her attorney, were competent evidence against him in the criminal trial. Applying the rule mentioned, it was there held that the letters being confidential communications, not even the address on the envelopes could be used as evidence against the husband; and in support of the ruling in that case, numerous decisions of English and American courts are cited.

In our opinion admission as evidence in this case of the letter written by appellant to his wife was an error prejudicial to his substantial rights, and the judgment is reversed for a new trial consistent with this opinion.

## CASE 89—INDICTMENT—SEPTEMBER 9.

## Commonwealth v. Hide.

## APPEAL FROM ALLEN CIRCUIT COURT.

1. **FORGERY.**—Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. It is not necessary that the whole instrument should be made false or fictitious.

Where a check for "seventy cents," the amount of which was also written in figures, thus "\$ <sup>70</sup>/<sub>100</sub>," near the top of the check, was altered by inserting the figure "3" between the dollar mark and the figures "70," leaving the words "seventy cents" in the body of the check unchanged, the alteration constituted a forgery, although the person to whom the check was presented for payment could, by close observation, have detected the forgery and prevented the consummation of the fraud.

2. **SAME.**—Upon the trial of the payee for the forgery, the fact that he alone had possession of the check, so far as the proof shows, from the time of its execution until its presentation for payment, coupled with the fact that he alone got the benefit of the change made, was sufficient to authorize the conclusion that he was guilty of the forgery, and therefore the case should have been submitted to the jury.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

The fact that the words were not written in the body of the check to correspond to the change in the figures makes no difference. It would make a difference under an indictment for obtaining money under false pretenses, but not under an indictment for forgery (Bishop's Crim. Law, Title "Forgery.")

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee, under an indictment for forgery, was, upon trial, found "not guilty" by the jury under a peremptory instruction from the court, and the Commonwealth has appealed.

The indictment charges that the defendant committed the crime named by feloniously and corruptly

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Commonwealth v. Hide.

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writing the figure 3 just after the dollar mark and before the figures 70 on the face of a check drawn in his favor by one J. S. Morehead on P. J. Potter & Co., bankers, with intent to defraud, &c., thus making the check one for \$3.70 when it was in fact one for only 70 cents.

The proof disclosed that Morehead gave Hide a check for seventy cents, writing the figures thus \$  $\frac{70}{100}$  near the top of the check, toward its right hand margin. The line below read ——— seventy cents ———  $\frac{70}{100}$  dollars. Shortly after the date of the check Hide presented it to the clerk of Wade & Co., merchants, and asked to be given two dollars in cash and balance in goods. The check was unchanged, save the figure 3 stood between the dollar mark and the figures  $\frac{70}{100}$ . Without observing the writing closely, the clerk made the exchange, and thereafter, upon discovering the mistake, had the accused arrested and put on trial as named.

Clearly the writing was a forgery, and the indictment in apt terms charged the defendant with the crime. It is certainly not necessary that the whole instrument should be made false or fictitious. Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. This check, in a material, and we may say a prominent, part, was altered, and it does not matter that the words "seventy cents" remained as written, or that, by close observation, the merchant could have detected the forgery and prevented the consummation of the fraud.

While, therefore, the alteration of the check must

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Commonwealth v. Hida.

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be held to have been a forgery, the question yet recurs whether the proof is sufficient to show that the accused made that alteration, or, in other words, committed the forgery. That he uttered the forged instrument is uncontradicted, but for that he was not on trial. There is no proof directly showing that he inserted the figure in question, but no one else is implicated or interested.

He alone got the benefit of the change made or had possession of the writing, so far as the proof shows, from the time of its execution by Morehead until its delivery to the clerk in its altered condition. It seems to us that the jury could readily have concluded, beyond any reasonable doubt, that the prisoner was guilty. The case should have been submitted to it. Quite rarely can the very act of falsifying a writing be shown, and to require the State to show more than it has in this case would furnish a too convenient loop-hole for the escape of the guilty and result in the frequent failure of justice. A like conclusion was reached by the court upon a similar state of case in *Mitchell v. State*, 64 Ga., 448.

Which is ordered to be certified as the law of the case.



## Hourigan v. Commonwealth.

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95 325

CASE 90—INDICTMENT—SEPTEMBER 14.

## Hourigan v. Commonwealth.

APPEAL FROM MARION CIRCUIT COURT.

1. **CHANGE OF VENUE—WAIVER OF OBJECTION TO JURISDICTION.**—Where a criminal case in which there has been a change of venue is upon motion of defendant remanded to the court of original jurisdiction, he can not, after being tried and convicted in that court, complain that it had no jurisdiction.
2. **SAME.**—Where the defendant has obtained a change of venue without observing the formalities provided by the statute, the Commonwealth consenting, he can not, after being tried in the forum thus selected by him, question its jurisdiction.
3. **SAME.**—The provision of the statute requiring that the record of a case, the venue of which has been changed, shall be filed in the court to which it is removed ten days before the first day of the next term of court, in order that it may stand for trial at that term, does not apply to criminal cases.
4. **A VERDICT WILL NOT BE SET ASIDE ON ACCOUNT OF THE MISCONDUCT OF ATTORNEYS IN ARGUMENT TO THE JURY** where the trial was in other respects fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury.
5. **THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING A CONTINUANCE** because of the absence of witnesses, on account of whose absence continuances had repeatedly been granted, there being nothing to show that by a continuance their presence could be had at the next term, and the affidavit for a continuance being read as their deposition.

## SAMUEL AVRITT FOR APPELLANT.

1. This court is not to determine the question of jurisdiction alone from an inspection of the indictment, but from the whole record. (*Walston v. Commonwealth*, 16 B. M., 28.)
2. After the venue has been changed in a criminal case, there is no way known to the law by which it can ever get back to the county from which it was taken. (Gen. Stats., chap. 12, art. 4, secs. 7, 8.)
3. Consent can not give jurisdiction. (*Lightfoot v. Commonwealth*, 20 Ky., 524.)
4. It was error not to compel the Commonwealth to admit as true the statements of the absent witnesses. (Bill of Rights, sec. 11.)

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5. The court below committed an error in refusing to permit witness Alfred Isaacs to testify before the jury. The court can not send the jury out, and in a colloquy between the witness, the court and the attorneys, determine what the jury may hear and what not. The office of *voir dire* is simply to determine the competency of the witness. (Greenleaf on Evidence, sec. 424, p. 474, 13th ed.; *Idem*, sec. 425.)

6. The court erred in its instructions to the jury.

One who is attacked with felonious intent is not under obligation to retreat. (6 Wait's Actions and Defenses, p. 644; *State v. Dixon*, 75 N. C., 275; *Erwin v. State*, 29 Ohio St., 186; 28 Am. Rep., 733; *McPherson v. State*, 29 Ark., 225; *Estep v. Commonwealth*, 86 Ky., 89.)

All instructions qualifying the right of self-defense, couched in such language as those given in this case, are erroneous and misleading, and leave the jury to determine what character of wrongful act deprives a man of the right. (*Allen v. Commonwealth*, 86 Ky., 645; *Martin v. Commonwealth*, 14 Ky. Law Rep., 498; *Benningfield v. Commonwealth*, 18 Ky. Law Rep.)

7. Attorneys for the Commonwealth were guilty of misconduct in their argument to the jury, and on that account a new trial should be granted. (*Cupp v. Commonwealth*, 87 Ky., 41.)

CHARLES PATTERSON AND S. A. RUSSELL OF COUNSEL ON SAME SIDE.

WM. J. HENDRICK, ATTORNEY GENERAL, AND FINLEY SHUCK FOR APPELLEE.

1. No objection was ever made to the jurisdiction of the court except by motion in arrest of judgment, and the only question raised by such a motion is as to the sufficiency of the facts stated in the indictment to constitute a public offense within the jurisdiction of the court. (Criminal Code, sec. 276.)
2. The court did not err in refusing a continuance on account of the absence of witnesses, as it was not shown that a continuance would bring the absent witnesses by the next term of court.
3. The instructions given were approved on the former appeal with the exception of No. 8, which was given on behalf of defendant; and those refused so far as they would have been proper, were embraced in instructions given.
4. As the whole argument of counsel is not given, the court can not determine whether the parts complained of were improper.

H. W. RIVES ON SAME SIDE.

1. If in other respects the trial was fairly conducted, and it is apparent that

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Hourigan v. Commonwealth.

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no other verdict could have been rendered without misconduct on the part of the jury, the verdict should not be set aside on account of misconduct of counsel for the prosecution. (*O'Brien v. Commonwealth*, 89 Ky., 361; *Rankin v. Commonwealth*, 82 Ky., 424; *State v. Hamilton*, 55 Mo., 520; *Thompson v. Bartley*, 27 Pa. St., 268; *Shuler v. State*, 105 Ind., 289; *Boyle v. State*, *Idem*, 469; *Porter v. Throop*, 47 Mich., 313; *State v. Zumhenson*, 7 Mo. App., 526; *Lamar v. State*, 65 Miss., 93.)

Especially will improper remarks of counsel be disregarded when provoked or called forth by like remarks of opposing counsel, or made in reply to such remarks. (*Jenkins v. N. C. Ore Dressing Co.*, 65 N. C., 568; *Rea v. Harrington*, 58 Vt., 181.)

2. No absolute and indefeasible right was attempted to be surrendered or disregarded, and any other right may be waived by a prisoner when, in his opinion, it is to his interest to waive it. (*Parker v. Commonwealth*, 12 Bush, 191.)
3. If the original change of venue had been improperly made, or for any reason was so defective that it failed to transfer jurisdiction, it was the duty of the Taylor court to remand the case to the court from which the attempted transfer came. (*Miller, &c., v. Cabell, &c.*, 81 Ky., 178.)

And if the court erred in remanding the case it could not affect the jurisdiction; and certainly it is now too late for the defendant to object to the jurisdiction after being tried in the county of his own selection. (*Kennedy v. Commonwealth*, 78 Ky., 447; *Lightfoot v. Commonwealth*, 80 Ky., 522.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In June, 1888, the appellant was indicted in the Marion Circuit Court for the murder of Samuel Hays. At the following term of that court, he obtained, in the regular way, a change of venue to Taylor county, and at his first trial there was found guilty, and his punishment fixed at confinement in the State penitentiary for life. He was granted a new trial by that court. The case was brought to this court by the Commonwealth to have the rulings of the lower court reviewed and the law of the case settled. (See *Commonwealth v. Hourigan*, 89 Ky., 305.) Subsequently, two other trials were had in the Taylor Circuit Court.

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The juries failed to agree each time. Finally, in April, 1893, on the motion of the defendant, the Commonwealth not objecting, the case was remanded to the Marion Circuit Court. At the succeeding term of the latter court, the defendant appeared on the calling of the case and moved to set aside the order entered at a former term transferring the cause by change of venue to Taylor county, which was done. His motion for a continuance was overruled and a trial had, which resulted in his conviction for manslaughter, the jury fixing his punishment at confinement in the penitentiary for ten years. His motion in arrest of judgment for want of jurisdiction in the Marion Circuit Court and for a new trial on various grounds being overruled, he has appealed to this court.

The first question is, whether the Marion Circuit Court had jurisdiction of the case. Appellant's counsel contend that the case was properly removed from Marion county, after which the Marion Circuit Court had no more jurisdiction over it than if it had never been there; that there is no way known to the law by which it could ever get back there, as chapter 12 of the General Statutes provides that but one change of venue shall be granted in any case; that the Taylor Circuit Court had no authority to set aside the order of the Marion Circuit Court sending the case to Taylor county, and the Marion Circuit Court had no power in 1893 to set aside its order of transfer made in 1888; that while the indictment shows that the alleged crime was committed in Marion county, the record also shows that the Marion Circuit Court,

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by its order of transfer, has lost all jurisdiction over the case, and that, as consent can not confer jurisdiction, the consent of the accused to the transfer and trial in Marion does not affect the question. With these views we can not concur. The motion of the defendant was simply to remand the case to the court of original jurisdiction. We think the Taylor Circuit Court had jurisdiction over this motion. It had the right to pass on it. The statute has no application, and presents no bar to the jurisdiction of the court in passing on the motion to remand.

The object of the law in providing for a change of venue is to afford the accused a trial in a community where the state of public opinion is such as that he can have a fair hearing, or is not such as to prevent it. Ordinarily he accomplishes this result by filing his petition and supporting it by the affidavits of others. But he may obtain the same result without observing these forms, the Commonwealth consenting. Whatever method is observed, he is but selecting a tribunal in which to be fairly tried.

These formalities provided by the statute may be regarded as so many hindrances to the attainment of his purpose. Therefore, if they are waived, and he selects his forum and submits himself to the jurisdiction, upon what principle can he afterwards complain? No constitutional or inalienable right is parted with or indeed any right; on the contrary, by the overt act of the defendant, he obtains directly what the statute gives him only through the observance of certain forms. In *Lightfoot v. Commonwealth*, 80 Ky., 524, it

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is said: "He," the accused, "will not be allowed, after being tried in the county of his own selection, to say that the verdict against him is void for want of jurisdiction in the court trying him. Consent can not give jurisdiction; but the purpose of the statute being to secure an impartial trial and authorizing a removal of the cause by the accused from the vicinage, the spirit, if not the letter of the statute, will sustain a verdict of guilty or of an acquittal, when the accused selects the county in which he is to be tried, although it may not be in a county adjacent to that in which the offense is committed."

The appellant complains because the record from Taylor county was filed in the Marion Circuit Court at the April term, when he was at once tried; that, as the statute provides in civil cases that a case does not stand for trial in the court to which it is removed, unless the record has been lodged with the clerk of the court ten days before the first day of the next term of court, such rule should be adopted in criminal cases. It is sufficient to say that there is no such statutory requirement, and no reason for any. The case was fixed for a day certain, in the order remanding the case, obtained on motion of the accused. The motion for a continuance by reason of the sickness of counsel was also properly overruled. The attorney whose sickness was urged as a ground therefor was present and participated in the trial.

There appears to have been no lack of counsel either in respect to numbers or ability to conduct the defense skillfully and zealously. Some stress is laid on what is charged as misconduct on the part of the attorneys

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representing the Commonwealth in their argument. But if, as has been repeatedly held, the trial in other respects was fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury—as we clearly think was the state of case here from a careful reading of the evidence—the verdict should not be set aside on such ground. (*O'Brien v. Commonwealth*, 89 Ky., 361; *Rankin v. Commonwealth*, 82 Ky., 424.)

The witnesses, on account of whose absence a continuance was asked, were all present and testified, save Hughes, Raney and Pipes, who had repeatedly been absent before and the case continued for them. It was not shown that by a continuance they could be had at the next term. This was the fourth trial, and the discretion allowed the court under section 189 of the Criminal Code, in permitting the affidavit for continuance to be read as the deposition of the absent witnesses was, we think, not abused in this case. There was no error in the instructions given, and none committed in refusing those offered by the defendant. The law of the case was substantially settled on the former appeal.

Judgment affirmed.

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Commonwealth v. Carter.

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## CASE 91—INDICTMENT—SEPTEMBER 14

## Commonwealth v. Carter.

## APPEAL FROM GRAVES CIRCUIT COURT.

AIDERS AND ABETTERS MAY BE PUNISHED AS PRINCIPALS under a statute creating a felony, unless it is plain from the nature of the offense that the intent of the statute is to inflict punishment only on the person actually committing the offense.

Under the statute providing for the confinement in the penitentiary "of any person" who shall feloniously break into a store-house with intent to steal, aiders and abettors may be punished as principals.

Stamper v. Commonwealth, 7 Bush, 612, overruled.

W. J. HENDRICK, ATTORNEY GENERAL, AND H. J. MOOREMAN FOR APPELLANT.

There is a lack of harmony in the decisions of this court upon the question presented in this case, and the court is asked to review the cases and determine whether Stamper v. Commonwealth, 7 Bush, 612, is to be applied to all such statutes, or is to be restricted or is overruled. (Ward v Commonwealth, 14 Bush, 238; Evans v. Commonwealth, 11 Ky. Law Rep., 574; Mullins v. Commonwealth, 14 Ky. Law Rep., 569.)

## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

An indictment was returned in the Graves Circuit Court against Mark Hubbard and two others, charging them with breaking into the store-house of one Boaz. The testimony showed that Hubbard took the window of the house out and his confederates stood watch a short distance from the store-room, and when the goods were removed by Hubbard, Carter and James, two confederates, took charge of them.

There was a separate trial demanded, and Ed Carter being first tried was acquitted upon a peremptory instruction based upon the case of Stamper v. Com-



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Commonwealth vs. Carter.

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monwealth, 7 Bush, 612. There can be no doubt of the correctness of the rule that, in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, others can not be brought within its provisions as principals upon proof that they were aiders and abettors. The case of *Frey v. Commonwealth*, reported in 83 Ky., 191, was an indictment under a statute enacted to prevent the destruction of bastard children by the mother. The statute reads: "If any woman be delivered of any issue of her body, which, being born alive, would be a bastard, shall endeavor \* \* \* to conceal the birth thereof, \* \* \* she shall be confined in the penitentiary," &c. (Gen. Stats., chap. 29, art. 4, sec. 14.) This statute was intended to apply alone to the mother, and illustrates the distinction between the cases.

In *Evans v. Commonwealth*, 11 Ky. Law Rep., 573; the statute provided that "if any one shall willfully and unlawfully burn" any house whatever, he shall be confined in the penitentiary. This statute was held to apply to aiders and abettors. Those who were present aiding and abetting in such cases are as much principals as the ones applying the torch or entering the building, and the doctrine of *Stamper v. Commonwealth* makes the rule too broad when saying that, where the offense is created by statute against one actually committing the offense, those aiding and abetting are not amenable as principals to its provisions. There is as much reason for punishing the aiding and abetting in a felony created by statute as there is if a felony at common

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law. So the doctrine of *Stamper v. Commonwealth* is overruled; but where in cases it is plain from the nature of the offense made a felony by statute, that its provisions were only intended to affect the party actually committing the offense, the doctrine of *Stamper v. Commonwealth* should apply.

As this is an appeal by the Commonwealth, the clerk is directed to certify the opinion to the court below.

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CASE 92—INDICTMENT—SEPTEMBER 14.

## Toler v. Commonwealth.

## APPEAL FROM LEE CIRCUIT COURT.

1. **INDICTMENT.**—Under the statute punishing as a felony the offense of willfully and maliciously shooting at and wounding another with intention of killing him, an indictment is good, although the word “willfully” is omitted from the accusatory part of the indictment, if it appears in that part of the indictment charging the mode of committing the offense.
2. **UNDER THE PRESENT LAW CONTROLLING THE CALLING OF SPECIAL TERMS OF CIRCUIT COURTS,** the order for a special term in counties where the circuit court has not a continuous session must, although made at the close of or during the regular term, specify the day when the special term is to begin, and also give the style of each case to be tried, or in which motions or orders are to be made. And this must also be done where the special term is called by a notice posted as the statute requires. But as that law is not retroactive in its effect, it does not apply to this case, as the order for the special term at which appellant was tried was made at the April term, 1893, of the Lee Circuit Court, and the act reorganizing the circuit courts, which contains the provisions as to special terms, was approved and went into effect June 10, 1893.

**H. C. LILLY AND RIDDELL & RIDDELL FOR APPELLANT.**

1. As the indictment does not charge that the shooting was done “will-  
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fully," it charges only a misdemeanor, and it was error to give instructions authorizing the jury to convict of a felony. (Gen. Stats., chap. 29, art. 6, sec. 2; Carroll's Code, sec. 124; Flint v. Commonwealth, 81 Ky., 186.)

2. The order convening the special term was void because it did not conform to the statute. (Act concerning courts of justice, chap. 221, sec. 16, acts 1891-92-98, p. 1085.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The indictment charges a felony. (Barnard v. Commonwealth, 22 S. W. Rep., 218; Johnson v. Commonwealth, *Idem*, 885; Woodson v. Commonwealth, 21 S. W. Rep., 584.)
2. If section 16 of the "act concerning courts of justice" means that the order of court entered at the last preceding regular term as well as the notice shall "give the style of each case to be tried," then the contention of counsel is correct. Otherwise the court was properly held, and the appellant properly convicted.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The cases of Flint v. Commonwealth, 81 Ky., 186; Barnard v. Commonwealth, 94 Ky., 285; and Johnson v. Commonwealth, 94 Ky., 341, determine the question made as to the indictment in this case. Section 2, of article 6, chapter 29, General Statutes, makes it a felony where one willfully and maliciously shoots at and wounds another with an intention to kill him.

The accusation in the indictment is: That the defendant committed the crime of malicious shooting at and wounding Moses Roberts, with intent to kill him, committed as follows: "That the said Toler did, on the — day of January, 1893, unlawfully, willfully, maliciously and feloniously shoot at and wound Moses Roberts with a pistol loaded, &c., with the intention to kill him," &c.

These averments, it seems to us, are sufficient to bring the case within the statute making it a felony where one willfully and maliciously shoots at and wounds another with the intention of killing him.

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The word willfully is omitted in the accusatory part of the indictment, but as to the mode of committing the offense it is charged that the defendant willfully, maliciously and feloniously shot and wounded, with the intent to take his life, and to say that the offense is not stated with such certainty as to apprise the defendant of what he stands charged, would be extremely technical, and nullify a conviction warranted by both the indictment and the proof. Some objection has been made as to the action of the court in refusing to permit certain testimony to go to the jury tending to show that the witnesses for the Commonwealth were under the influence and control of the prosecuting witness, and while no harm could have resulted to the Commonwealth by the admission of such testimony, it was at least immaterial when the fact of the shooting was clearly established, and the statutory offense so completely made out as to leave the jury with nothing to consider but the extent of the punishment to be inflicted.

There is one objection made by counsel that would necessitate a reversal if the present law in regard to calling special terms of circuit courts had been in force when the special term was called to try this case. A part of the act in regard to the organization of circuit courts provides "that a special term may be held in any county, either by an order entered of record at the last preceding regular term in the county, or by notice signed by the judge, and posted at the court-house door of the county for ten days before the special term is held. *The order or notice shall specify the day when the special term is to com-*

*mence*, and shall give the style of each case to be tried, or in which any motion, order or judgment may be made or entered at the special term, and no other case shall be tried, or motion, order or judgment entered therein, unless by agreement of parties." It is evident, therefore, that in counties where the circuit court has not a continuous session, the order for a special term, although made at the close of or during the regular term, must specify the day when the special term is to commence, and also give the style of each case to be tried, or in which motions, orders or judgments are to be made or entered. This also must be done when the special term is called by a notice posted as the statute requires. Such is the legislative will, and this court must enforce the law as we find it on the statute book, and however inconvenient it may be to call the attention of litigants to the cases to be heard or those in which motions are to be made, the act is imperative and must be followed.

When looking to this record, however, we find that the special term at which the accused was tried was called before the act reorganizing the circuit courts went into effect, and, therefore, the objections made by counsel cannot avail. The order for a special term was made at the April term of the Lee Circuit Court, held in the year 1893, and the act reorganizing the circuit courts, and under which this objection was taken, was not approved by the Governor until the tenth of June, 1893, and by its provisions was to take effect when approved. It was never intended that this statute should have a retroactive effect, and nullify orders made in cases

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authorized by existing laws. And while the statute in question has no application to the present case, it is proper by reason of its peculiar provisions, that the attention of circuit judges should be called to its provisions and the construction placed upon it by this court, as it involves only a preliminary step in facilitating the administration of the law.

The judgment below is affirmed.

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CASE 93—PETITION EQUITY—SEPTEMBER 14.

Peak, &c., v. Gore.

APPEAL FROM BOYLE CIRCUIT COURT.

1. **VENDOR AND VENDEE—FRAUD.**—When the purchaser of real estate has made his purchase after having time and opportunity to ascertain for himself the value of the property, and after he has in fact examined it, commendation or even false representation of its value by the vendor does not afford ground for rescission.
2. **SAME—UNDISCLOSED LIENS—RESCISSION.**—Ordinarily a vendee can not be prejudiced by reason of prior liens on the property purchased if for less amount than unpaid purchase money past due by him, but where a vendor who has covenanted to make "a good and legal title," upon payment of first installment of purchase money, accepts the payment of that installment and makes a deed without clearing the property of an existing incumbrance, as his contract to make "a good and legal title" bound him to do, and without disclosing the existence of the incumbrance, the vendee, not being in default, is entitled to a rescission, if by reason of the insolvency of the vendor and the amount of the prior liens he is in danger of losing the property by enforced sale, although the unpaid installments of purchase money not yet due may amount to more than the prior liens upon the property.

**ROBERT HARDING AND GEORGE DAVISON FOR APPELLANT.**

The appellant is entitled to a rescission because of the false representations as to value and the concealment of the existence of incumbrances,

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106	157
94	533
118	409
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appellee having represented that he would make a good and clear title to said property, "free from liens and mortgages," and covenanted to "execute a good and legal title."

**BRECKINRIDGE & McFERRAN FOR APPELLEE GORE.**

1. The false representations as to value, if any, do not afford ground for a rescission, appellant having an opportunity to know the value of the property.
2. Appellant had knowledge of the existence of the incumbrances, but even if she did not, she is indebted to appellee Gore in a sum more than double the amount of the incumbrances, and, therefore, can not complain.

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

November 18, 1887, James Gore sold to Amanda Peak and E. C. Montgomery, a lot of land in Junction City, on which was the "Gore Hotel," and furniture, for ten thousand dollars, and as evidence of the sale, a written contract was entered into and signed by the parties. By its terms Gore agreed to make to them "a good and legal title," upon payment of one-third the purchase price and execution of two notes each for one-half the residue, bearing interest at the rate of eight per cent. per annum, and payable in one and two years from the last of March, 1888, when the cash payment was to be paid and notes given. It was agreed they were to have possession of the property and it was delivered in December, 1887, but to pay rent therefor at the rate of sixty dollars per month until the cash payment was made and notes executed, and also to board Gore and his brother during the same period free of charge. March 20, 1888, Mrs. Peak sold and conveyed to Gore a tract of fifty acres of land for about three thousand seven hundred dollars, of which three thousand three hundred and thirty-three dollars and thirty-three cents

was used to make the cash payment for the hotel property, and for the residue, Gore gave her his promissory note that she sold, and proceeds of it were used to buy hotel supplies.

This action was brought September 8, 1888, by Mrs. Peak, for rescission of the contracts of sale and purchase of the hotel property and the tract of land, for restoration to her of the tract of land and cancellation of the two notes given for balance of the ten thousand dollars. Montgomery was made defendant to the action; but in his answer, made cross-petition against Gore, the same relief was prayed for as asked in the petition. The lower court, however, dismissed both petition and cross-petition without giving any relief at all.

The evidence makes it too plain for controversy that the hotel property for which appellants agreed to pay ten thousand dollars, was not at the time, nor is now worth half that sum. Indeed, only one of nine witnesses who, having knowledge on the subject, testify as to its value, say it was or is worth as much as five thousand dollars, the value as fixed by the others being from two thousand dollars to four thousand dollars, so that in view of the fact her son-in-law and co-purchaser, E. C. Montgomery, is insolvent and unable to pay any part of the purchase price, the bargain is a very hard one for Mrs. Peak, who is a widow. But the relief prayed for could not be granted for that reason alone.

It is stated in the petition, and also sworn to by Mrs. Peak and Montgomery as witnesses, that pending negotiation about the trade and also at the time



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the contract was reduced to writing, Gore, as an inducement for them to purchase the property, stated it was worth and he had been offered for it ten thousand dollars, and that its earning capacity was from twenty-five dollars to fifty dollars per day. He practically admits making the statement as to its value, and though not as distinctly confessing he made the other alleged statement, it is evident to us from the manner in which his testimony is given, that he did do so. And as Mrs. Peak had at the time no experience or knowledge in regard to the value or earning capacity of hotel property, and Montgomery very little if any more, it is manifest the representations of Gore unduly influenced them to make the purchase, which they both testify neither had previously any intention to do. This, therefore, seems to us from all the circumstances, to be the case of persons without practical knowledge or experience of the value or management of particular property, being allowed to buy and pay an exorbitant price for it by representations of the owner, known by him to be untrue. But as they purchased after having time and opportunity to ascertain for themselves value of the property, and did in fact examine it, commendation or even false representation of its value by Gore can not, according to a settled rule, afford ground for rescission.

There, however, existed when the contract was made, mortgage liens upon the hotel property for near, if not quite, three thousand\* dollars, which it is alleged in the petition and cross-petition, Gore fraudulently concealed from them, and of which they continued

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ignorant until June, 1888, when first informed in regard thereto. Gore denies he concealed existence of the liens, or stated to them, as they allege, that the property was unincumbered.

But it is evident they were misled and deceived on that subject by him; for how could he, as he covenanted in the contract of November, 1887, make them a good and legal title, which is equivalent to and means a title to property clear of claims and liens of others, if there were existing mortgages that he had made no provision to satisfy, and, as now appears, did not design to satisfy prior to or even when the deed was to be executed and delivered by him; for although he sold the tract of land shortly after Mrs. Peak conveyed it to him in payment of the first installment of purchase price of the hotel property, no part of the proceeds, except about two hundred dollars, was applied to pay the mortgage debts, and so far as the record shows, they had not been paid even when the judgment appealed from was rendered; and in view of the alleged and undisputed fact that Gore was insolvent, it is not at all reasonable Mrs. Peak would have conveyed to him her own land, executed the two notes, and accepted his deed without an assurance and belief the hotel property was free of incumbrance.

But, waving the question of fraud, the case seems to us to stand thus: Gore had the right to insist upon complete performance of the contract on the part of Mrs. Peak and Montgomery, which consisted in paying deferred installments when they fell due, and they consequently were without right to a re-

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scission, provided there has been no breach or failure on his part whereby they were materially prejudiced.

Ordinarily a vendee could not be prejudiced by reason of prior liens on property purchased, if for less amount than unpaid purchase money past due by him, nor have a right to complain of the property being subjected and sold on account of his own default. But in this case, Mrs. Peak and Montgomery had not defaulted in paying the unpaid installments of purchase money, none of which was due until March, 1889, nor failed to comply with their part of the contract in any respect. But Gore had failed to clear the property of incumbrance before the first installment of purchase money was paid, and the deed was made and delivered as he was bound to do. And, as a consequence of such failure, there existed when this action was commenced, mortgage debts amounting, it is true, to not as much as the unpaid installments of purchase money, but to nearly if not quite as much as the evidence shows the hotel property was worth; and if added to the cash payment made by Mrs. Peak in March, 1888, the aggregate amount would be double the value of the property. So that Gore being insolvent, and his creditors having the right to enforce their mortgage liens on the hotel property at any time, Mrs. Peak, without fault of herself or Montgomery, but by reason of a breach of the contract by Gore, was put in danger of not only losing by enforced sale the hotel property, but also the tract of land conveyed by her in payment of the first installment of purchase money. The question in this case is, therefore, not whether

the unpaid installments of purchase money equaled in amount the mortgage debts that it was the duty of Gore to pay off before receiving any part of the purchase price, or undertaking to convey the property, but it is whether he did, in March, 1888, make such conveyance of the property as he had covenanted to then make. The deed made by him certainly did not convey a "good and legal title;" nor has he since tendered such deed. Moreover, the evidence shows him to be by reason of insolvency unable to discharge the mortgage liens, which is indispensable in order to full compliance with his contract.

In our opinion the purchasers of the hotel property were clearly entitled to a rescission of the contract when this action was commenced, and the lower court erred in dismissing it. Instead, a judgment ought to have been rendered, rescinding the contract of sale and purchase of the hotel property, canceling the unpaid purchase money notes, and restoring the parties in other respects to their original status so far as can be done equitably and without prejudice to the rights of others; and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

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Long v. Bowen.

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CASE 94—PETITION ORDINARY—SEPTEMBER 14.

## Long v. Bowen.

APPEAL FROM NICHOLAS CIRCUIT COURT.

**THE CONFINEMENT OF A PUBLIC OFFICER IN AN INSANE ASYLUM** pursuant to a judicial finding that he is a lunatic, creates a vacancy in the office within the meaning of article 6, chapter 33 of the General Statutes, and an election having been held to fill the vacancy, the former incumbent of the office can not, upon being discharged from the asylum as cured, claim the right to have the office restored to him.

**NORVELL AND KENNEDY & SON FOR APPELLANT.**

1. The person entitled to an office can not bring an action to prevent usurpation of the office unless he brings it during the three months next after the usurpation. After that time it must be brought by the Commonwealth's attorney, and the person entitled to the office can not sue to recover the fees until it has first been adjudged in the action brought by the Commonwealth's attorney that he is entitled to the office. (Civil Code, secs. 480, 483-488.)
2. Where an officer has been adjudged a lunatic, there is a "vacancy in office" within the meaning of sec. 1, art. 6, chap. 33, Gen. Stats (McKee and wife v. Thompson, 5 Bush, 687.)

The modes of creating a vacancy in office recognized by the Constitution are not exclusive of all others. (Constitution of 1850, art. 6, sec. 7; art. 4, secs. 3, 35, 36; art. 5, sec. 3.)

**HANSON KENNEDY AND ROSS & OWENS FOR APPELLEE.**

1. The Code of Practice does not impose any limitation as to the time within which an action of this character may be brought. (Civil Code, secs. 483, 484, 488.)
2. The power of the county court to declare a "vacancy in office" is an executive and not a judicial power. (Justices of Spencer County Court v. Harcourt, 4 B. M., 500; Gilbert v. Bartlett, 9 Bush, 53.)
3. The insanity of an assessor during his term of office does not create a "vacancy in office" within the meaning of the statute. The words, "or otherwise," used in the statute, include only such vacancies as may occur under these provisions of the Constitution which provide for the removal of officers. (Gen. Stats., chap. 33, art. 6, sec. 1; Constitution of 1850, art. 5, sec. 3; *Idem*, art. 4, sec. 36; Lowe v. Commonwealth, 3 Met., 237; Bartly v. Fraine, 4 Bush, 875.)
4. A man who is insane is not on that account to be deemed "civilly

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dead." (Chitty's Blackstone, vol. 1, pp. 95-96; Bouvier's Law Dictionary, vol. 2, word "Right;" Avery v. Everett, and notes thereto, 6 Am. St. Rep., 368-383; Rankin's heirs v. Rankin's ex'ors, 6 Mon., 531.)

5. Even if lunacy will create a "vacancy in office," the order of the county court declaring the office of assessor vacant was prematurely made. The court in June, 1889, had no legal right to presume that appellee would be of unsound mind on the 15th of September following, the time when his duties were to commence. (*Montgomery v. Commonwealth*, 88 Ky., 509.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee, in August, 1886, was elected assessor of Nicholas county, and qualified and entered upon the duties of the office, [and continued to discharge the duties of the office until the 27th of April, 1889, when he was, by proper proceedings and by a court of competent jurisdiction, adjudged a lunatic, and committed to the Eastern Kentucky Lunatic Asylum, where he remained a lunatic until the 27th of August, 1889, when, as it is presumed, he was discharged as cured. In the meantime, by proper proceedings, the office of assessor was, by the county court, declared to be vacant, and an election to fill the vacancy was ordered and held on the first Monday in August, 1889, which resulted in the election and qualification of the appellant, who entered upon the duties of the office.

After appellee returned from the asylum, he demanded the books of the office from the appellant, but he refused to deliver them, and made the assessment of the county for that year. The appellee by this action charges that the appellant had usurped the office, and asks judgment against him for the fees of the office that he had received. The lower court sus-

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tained his contention. and the appellant has appealed. The question to be decided is, was there a vacancy in the office at the time it was so declared by the county court in the sense of chapter 33, article 6, which is as follows: "The term vacancy in office, or equivalent phrase, as used in this article, means such as exists when there is an unexpired part of a term of office without a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, or when there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the State, county or district, or otherwise."

The fifth section provides that the county court shall have power, in case of a vacancy in the office of assessor, sheriff, &c., to fill it until the next August election, at which time there shall be an election to fill the vacancy.

The question is, did the judicial finding that the appellee was a lunatic, and his confinement in the insane asylum in accordance with such finding and while the finding was in force, create a vacancy in the office of assessor, and authorize an election to be held to fill the vacancy? The judgment of the court that the appellant was a lunatic, and that he should be confined in the lunatic asylum was, in effect, that the confinement should be that of physical restraint, and that he should be deprived of the right to transact any business or to take charge of and control his estate, but the management and control of the same should be confided to some pru-

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dent person to be appointed by the court; also that he should have no standing in court except through a committee, &c.; also that he should be deprived of the power to contract or be contracted with; also to deprive him of the power to control his own family, or to do other things that a sane person has the legal right to do.

The appellee's status was thus judicially determined, which was in force at the time of the election and qualification of the appellant. The appellee, so far as these things were concerned, or of discharging the duties of the office, or of performing any other civil duties, was civilly dead, not in the sense of a punishment but as a protection.

It seems, from what has been said, that the statute *supra* should be construed to mean not only resignation, removal from the State, county or district, whereby he abandons his official duties, and the county loses control over him, but death, natural or civil; the latter, by the judgment of the court, depriving him of the right and power to execute the duties of the office, as well as the former, creates a vacancy in the office. It seems that the expression "or otherwise" has reference to such other things as, by judicial determination at least, deprives the incumbent of the right and power to discharge the duties of the office.

The confinement of the appellant in the insane asylum under the writ of lunacy certainly deprived him of the power to execute the duties of the office.

The judgment is reversed, and cause remanded with directions for proceedings consistent with this opinion.



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Mattingly & Co. v. Berry.

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CASE 95—PETITION EQUITY—SEPTEMBER 16.

**Mattingly & Co. v. Berry.**

APPEAL FROM DAVEISS CIRCUIT COURT.

**HOMESTEAD.**—Where a debtor, after leaving his home in one town moved to two other towns in succession, engaging first in one business and then in another in the last town to which he moved, he can not, after the property originally occupied by him as a home has been sold to satisfy a debt contracted by him while thus engaged in business, be allowed to claim a homestead therein upon the ground that his abandonment of his home was only temporary, and with a fixed purpose to return, his conduct being inconsistent with such an intention.

**R. S. TODD FOR APPELLANTS.**

There was an abandonment by appellee of his homestead, his conduct being inconsistent with "a fixed purpose to return." (Carter, Fisher & Co. v. Goodman, &c., 12 Bush, 228; Burch v. Atchison, &c., 6 Ky. Law Rep., 636; Curran v. Culf, Adm'r, 13 Ky. Law Rep., 84; Nethercutt v. Herron, &c., 10 Ky. Law Rep., 247.)

**BIRKHEAD & CLEMENTS FOR APPELLEE.**

The homestead right is not forfeited where there is a mere temporary removal with the intention to return at some future time and make the premises a home. (Hansford v. Holdam, 14 Bush, 210; Hereforth v. Zimmerman, 7 Ky. Law Rep., 669; Davis v. Pritchard, 9 Ky. Law Rep., 914; Black v. Black's Adm'r, 11 Ky. Law Rep., 378; McFarland v. Washington, 12 Ky. Law Rep., 376.)

**CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.**

In the spring of 1886, the appellee purchased and built upon a lot in the town of Yelvington, which he thereafter occupied with his family as a homestead, until October of the same year. He then moved to Knottsville, in the same county, and there went to housekeeping, and engaged, while he lived at that place, which was six or seven months, in collecting taxes. He says he moved to said place and there

lived because it was nearer the center of the taxing district. He then moved from that place with his family to the city of Owensboro, and there engaged in the business of hotel-keeping in partnership with Mr. Aull; he continued in said business several months, and during the continuance of said business, he created the debt for the purchase of whiskies, for payment of which the house and lot in Yelvington was sold. When he quit the hotel business, he engaged in the business of butchering in said town.

In July, 1888, and before the appellee had returned to said property or indicated any intention to do so, the house and lot was sold under execution to satisfy said debt. The appellee then brought this suit to recover said property as a homestead, alleging that he only abandoned it temporarily with a fixed purpose at the time to return and occupy it as a homestead. Did he have, at the time he left said property, a fixed and actual purpose and intention to return and reside on the property again, and did that intention continue to exist to the time of the sale of the property? That is the question.

It is well settled by this court, that in order for a person to claim his homestead as against the rights of creditors, after abandoning the same, the abandonment must be temporary, with a fixed purpose at the time of abandonment to return to said property and occupy it as a homestead. (Carter, Fisher & Co. v. Goodman, &c., 11 Bush, 228; Burch v. Atchison, &c., 82 Ky., 585; Curran v. Culf, Adm'r, 13 Ky. L. R., 84; Nethercutt v. Herron, &c., 10 Ky. L. R., 247.)

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It seems that the appellant's moving to Knottsville to collect taxes was entirely consistent with the idea of a removal for a temporary purpose and would so indicate; but his thereafter moving to the city of Owensboro and engaging in the hotel business, and after having failed in that business, engaging in butcher's business would indicate that he had left his home at Yelvington with the fixed purpose of permanently abandoning it. His movements clearly indicated that purpose, and the persons with whom he dealt and contracted debts doubtless understood it that way, and that the property at Yelvington was subject to his liabilities. Now it seems that after giving to the persons with whom he dealt the reasonable assurance that he had permanently abandoned his old homestead and made his home elsewhere and contracted debts on the faith thereof, it would be a deception and a fraud upon them to allow him to claim a homestead in said property by making known, after incurring these obligations, his secret intention of returning to said property and occupying it as a homestead. (See 6 Ky. L. R. *supra*.)

The judgment is reversed, &c.

## American Accident Company v. Reigart.

CASE 96—PETITION ORDINARY—SEPTEMBER 16.

## American Accident Company v. Reigart.

APPEAL FROM MASON CIRCUIT COURT.

1. A POLICY OF INSURANCE MUST BE LIBERALLY CONSTRUED in favor of the insured, and where the words are without violence susceptible of two interpretations, that which will cover the loss must in preference be adopted.
2. ACCIDENT INSURANCE.—The death of a person caused by a piece of beefsteak passing into the windpipe in eating is a death received through "external, violent and accidental means" within the meaning of an accident insurance policy, restricting the right of recovery to cases of death from such means.
3. BURDEN OF PROOF.—In an action upon an accident insurance policy, the defendant having attempted to deny that death was caused by the accident as alleged in the petition, the burden was on the plaintiff, and she was entitled to the concluding argument to the jury, and the defendant will not now be allowed to say that its denial was bad, and that as the only defense was that the insured was intoxicated, it was entitled to the burden of proof.

## L. W. ROBERTSON FOR APPELLANT.

1. To authorize a recovery on the policy sued on it is not sufficient that death resulted from accident, but the accident must have been caused by external violence, or by means externally violent. In the case at bar there was no external violence, and, therefore, can be no recovery. *McGlinchey v. Fidelity and Casualty Co.*, 80 Me., 251 (6 Am. St. Rep., 190), and *Paul v. Travelers' Ins. Co.*, 112 N. Y., 472 (8 Am. Rep., 758), distinguished.
2. The burden of proof was on appellant, and the court erred in giving to appellee the concluding argument to the jury.

## THOMAS H. HINES OF COUNSEL ON SAME SIDE.

## COCHRAN &amp; SONS FOR APPELLEE.

1. A death caused by a piece of meat accidentally passing into the windpipe and lodging there is a death through external and violent means within the meaning of the policy sued on. (*May on Insurance* (3rd ed.), sec. 175; *Healey v. Mut. Acc. Asso.*, 133 Ill., 556; *Southard v. The Railway Pass. Ass'n*, 34 Conn., 574; *Bacon v. U. S. Mut. Acc. Ass'n*, 44 Hun., 599; *Paul v. Ins. Co.*, 112 N. Y., 472; s. c., 45 Hun., 318; *U. S. Mut. Acc. Ass'n v. Newman*, 84 Va., 52; *Pickett v. Pac. Mut. Life Ins. Co.*, 22 Atl., 871; *McGlinchey v. Cas. Co.*, 80 Me.,

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- 251; Trew v. Assurance Co., 5 Hurl. & N., 211; Reynolds v. Ins. Co., 22 Law T., 820; Winspear v. Ins. Co., 42 Law T. (N. S.), 459.)
2. Appellant in its answer denied that decedent's death was occasioned by a piece of meat or beefsteak accidentally passing into his windpipe while eating, and, therefore, the burden was on appellee. But if not, the evidence is so palpably for appellee as to render it idle to grant a new trial because appellant was not given the concluding argument to the jury. (Royal Ins. Co. v. Schwing, 87 Ky., 410.)

JOHN F. LACY AND EDWARD W. HINES OF COUNSEL ON SAME SIDE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee, Julia J. Reigart, the widow of Thomas J. Reigart, instituted this action in the Mason Circuit Court to recover five thousand dollars upon an accident policy, issued by the American Accident Company, of Louisville, Ky., to said Reigart, and made payable to his wife if she survived him.

Her husband lost his life by eating a piece of beefsteak, that in the attempt to swallow, accidentally passed into his windpipe, choking him to death in a few moments. By the terms of the policy, the insurance was made payable *for injury or death received through external, violent and accidental means*. That the death of the insured was accidental is conceded, but it is contended that the contract of insurance only embraces accidental injuries caused by external violence or accidents brought about by means externally violent.

It is argued that the act of chewing or eating food is natural and harmless, and if in eating, a part of the food passes into the windpipe, causing death, it can not be said that death was produced by means of external violence or force; in other words, that the plain meaning of the language of the policy, "*through*

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*external, violent and accidental means,"* is that the accident causing death must have been caused by an external force. The court below, placing a different construction on the contract, said in effect to the jury, if the death was accidental and caused by the passing of the steak into the windpipe, they should find for the plaintiff.

The rule laid down by Mr. May in his work on Insurance (3d edition), section 175, is as follows: "No rule, in the interpretation of a policy, is more fully established or more imperative and controlling than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain and cover the loss must, in preference, be adopted." And we might add that no construction should be placed upon such contracts as would defeat the intention of both parties, as it is manifest, if the interpretation given the language of this policy by counsel for the defense is adopted, it would defeat the intention of both the contracting parties.

The doctrine of this court as announced in *Hutchcraft's Adm'r v. Travelers' Ins. Co.*, reported in 87 Ky., 300, where the authorities were reviewed on the question there presented, recognizes fully this rule of construction, and that regard must be had to the purpose sought to be accomplished by both the parties.

This appellant is an accident insurance company,

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and its policies are termed *accidental policies*, and the very object of insuring in such companies is to obtain indemnity where an injury or death results from accident. And while the policy provides that the liability arises where the injury "is through external, *violent and accidental. means independently of all other causes,*" it was not designed that there should be such external violence, as a fall, a kick, or a blow on the person, as would cause death or an injury before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases resulting in injury where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes, and that were liable to occur at any time from natural causes.

If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion, or to completely stay the operations of nature in such a manner as to produce disease, no one would contend that the pain or the disease was the result of accident, or that the terms of this policy embraced such a case, but when the substance causing the death is visible and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine. There

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is no external force or violence from the poison, and the injury internal in its character, and yet the authorities hold that the insurance company is liable in such a case. (*Healey v. Mutual Accident Ass'n*, 133 Ill., 556.) It is plain, we think, that the means or that which caused the injury should be external, and not that the injury should have been external.

It is said, however, that if the injury is not to be external, that the death must have resulted from *violent* and accidental means. It is universally understood when it is said "that one died a violent death" that it was unnatural—a death not occurring in the ordinary way, and in fact the definition of the word *violent* is unnatural, and in using this word the insurance company was attempting to prevent the insured from asserting a claim when the injury or death was the result of some natural cause.

In the case of *Paul v. Travelers' Ins. Co.*, 112, N. Y., 472, on a similar policy, it was held "that a death unnatural, the result of accident, imports an external and violent agency as the cause." This same view was taken by the Illinois Supreme Court in the case of *Healey v. Mutual Accident Association* already cited. A similar construction to the verbiage of like policies has been heretofore given by courts of last resort, and if companies organized as this is, intended that actual external force causing the accident must be shown before a recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning. The instructions below were proper, and in our opinion, the widow entitled to recover.



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Another ground of reversal is the refusal of the court below to give to appellant's counsel the concluding argument. A demurrer had been overruled to the petition, which, in effect, was a decision for the plaintiff if the accident occurred as alleged. The legal question was, therefore, settled, but there were two defenses to the claim—first, a denial that the accident causing the death happened as alleged by the plaintiff; second, that the deceased was under the influence of intoxicating drinks when the accident occurred, and that by an express provision of the policy this exempted the appellant from liability. The proof failed to sustain the second ground of defense, and the denial that the accident was caused as alleged was the only issue of fact that the appellee was required to establish. The overruling of the demurrer did not dispense with the necessity of the plaintiff showing that the death of the intestate was caused by the accident as alleged; and while the sufficiency of the answer may be questioned by reason of the manner in which the denial is made, still it was the appellant's defense, and it attempted by it to place the burden on the plaintiff, and will not be allowed now to say that because its pleading was bad the burden was on the plaintiff.

The judgment below must be affirmed.

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Tuttle, &c., v. Berryman.

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CASE 97—PETITION EQUITY—SEPTEMBER 16.

**Tuttle, &c., v. Berryman.**

APPEAL FROM CLARK COURT OF COMMON PLEAS.

WHERE A PAPER REFERRED TO BY A TESTATOR AS A PART OF HIS WILL IS CLEARLY AND CERTAINLY IDENTIFIED, it is not necessary that it should be probated and recorded with the will in order to give it effect as a part of the will. But a testator having provided in his will for a division of his lands among his children in accordance with "deeds" which he refers to as having been made by him, mere memoranda made by a surveyor and not signed by the testator can not be identified by parol testimony as the "deeds" intended by the testator, as this would be to change by parol testimony the entire character of the instrument referred to as a part of the will.

**ISAAC N. CARDWELL FOR APPELLANTS.**

1. The devisees having all consented to the probate of the will, and each having taken possession of his portion of the land as laid off to him by his father, it is now too late to complain.
2. If the appellees desired or intended after the probate of the will to move to set aside or vacate the will or any of its provisions, they should have done so by appeal to the circuit court where a jury should have been empaneled to try whether or how much of the paper is or is not the last will of James Shepherd. (Gen. Stats., chap. 113, sec. 25.)
3. The judgment admitting the will to probate is conclusive as long as it remains in force. (Abbott v. Taylor, 11 Bush, 385; Walters v. Ratliff, 5 Bush, 577; Womack v. Watson, 4 Ky. Law Rep., 907.)

**HAGGARD & BENTON FOR APPELLEES.**

1. If the memoranda to which the answer refers can be identified with sufficient certainty to give them validity and effect as parts of a will, they should have been produced, proved and admitted to probate with and as a part of the instrument which was signed by the testator. (Schouler on Wills, sec. 281; Newton v. Seaman's Friend Society, 130 Mass., 91.)
2. Before any document can be incorporated in the probate of a will three things are necessary: (1) That the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made, and (3) proof of the identity of such document with that referred to in the will.

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Tuttle, &c., v. Berryman.

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## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

James Shepherd, at his death, left a last will and testament and three children surviving him. This action below was instituted to have his will construed. The provision from which the litigation arises is as follows: "And at my death, and the death of my wife, Susan, this two hundred and forty-five acres of land I have made deeds to my three children, giving corners and lines *as the deeds describe*, and at our death they are to have peaceable possession of their land *described in deeds*."

The widow of the testator died, and the plaintiff, one of the children, seeks by this petition a partition of the land in equal parts, alleging that no deeds were ever made. The appellants answer and say that the draftsman of the will made, at the time it was written, memoranda of the location, quantity and boundary of each child's portion, and the memoranda were what the deviser termed deeds; and, further, that the appellee had entered and cultivated his part as designated by the memoranda for one year. There was a demurrer to the answer and the demurrer sustained and a partition ordered.

It is contended in argument for the plaintiff that a writing referred to in the will, so as to be made part of it, must be recorded or probated with the will itself, so as to make it effectual. We do not understand this to be the rule. A paper executed that is signed by the testator, or if unexecuted, as in this case, must be so described by the will itself as to leave no doubt in the mind of the chancellor that it is the paper referred to. It must be clearly

and certainly identified. The will being properly attested and admitted to probate establishes the paper as a part of that instrument; it refers to it, and the probate incorporates it as part of the will. (Redfield on Wills, vol. 1, page 264.) We must, however, concur with the court below in his ruling sustaining the demurrer.

The memoranda were made by the draftsman; were never signed by the testator; no deeds were ever executed, and to admit testimony that mere memoranda were intended as a deed, would be to contradict the express language of the will itself. Parol testimony that changes the entire character of the instrument referred to in the will, would be dangerous in its character and enable any paper to be substituted as the one referred to by the testator.

It is immaterial what the intention of the deviser may have been; for it is often easy to show by parol, if such testimony was admissible, that the testator intended to do that which is directly the reverse of his intention as expressed in the will itself. And while the testator may have designed to make a division of this land in his life-time, and perfect the title in his children, still he failed to do so, and proof of the making of mere memoranda by the draftsman or surveyor as evidence of title in the children, when the will says that deeds had been made, would be identifying and making a part of testator's will a writing that in no manner corresponds with that referred to in that instrument. It was no doubt the intention of the testator to make deeds and leave his children with a title to the land referred to in the memoranda.

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It was something to be executed in the future. He may have changed this purpose, and concluded to let an equal division be made, as he no doubt attempted himself to do. The will is intelligently written. Both the draftsman and the testator must have known that these memoranda on a paper by one other than the testator and not signed by him, were not a deed or a bond for title, and it is plain that the probate did not carry with it and make part of the will the memoranda made by the draftsman.

Judgment affirmed.

CASE 98—PETITION EQUITY—SEPTEMBER 19.

Pfingst, &c., v. Senn, &c.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

**INJUNCTION AGAINST A THREATENED NUISANCE** will not be granted when the thing complained of is not *per se* a nuisance, but may or may not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury.

The opening of a beer garden, dancing hall and bowling-alley in a city will not be enjoined, although the same place of amusement as formerly conducted may have been a nuisance.

**O. A. WEHLE AND O'NEAL, PHELPS & PRYOR FOR APPELLANTS.**

1. The annoyances described in the petition constitute such a private nuisance as will justify the interference of the chancellor. (High on Injunctions, sec. 778; Walker v. Brewster, L. R., 5 Eq., 25; Inchbald v. Robinson, L. R., 4 Ch., 888; Soltan v. DeHeld, 2 Sim. N. S., 183; Snyder v. Cabell, 29 W. Va., 48.)
2. The fact that the nuisances are only threatened is no reason for denying the injunction. (Wood, Law of Nuisance, sec. 100; *Idem*, sec. 797.
3. The fact that the garden has for several years been used as a beer garden and place of entertainment does not deprive plaintiffs *per se*

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of the right to an injunction. (*Rodenhurst v. Coates*, 6 Grant's Ch., 140 (cited by Wood, sec. 592); *Louisville Coffin Company v. Warren*, 78 Ky., 406; Wood, sec. 360; *Learned v. Castle*, 78 Cal., 454.)

And though acquiescence might prevent the plaintiffs from stopping the nuisance, still they are not compelled to stand any increase of it. (Wood, sec. 803, last sentence; *Bankhart v. Houghton*, 27 Beav., 425; *Lawler v. Potter*, 1 Hannay (N. B.), 328; *Tipping v. St. Helen Smelting Co.*, 4 B. & S., 608.)

**ROGERS & DUNCAN FOR APPELLEE.**

1. Irreparable injury is a prerequisite to interference of equity by injunction. (High on Inj., sec. 740.)

A general allegation of irreparable injury not sufficient. The facts showing it must be stated. (High on Inj., secs. 35-1581; *McKinzie v. Mathews*, 59 Mo., 101.)
2. It must appear the act is illegal before an injunction will be granted. (High on Inj., 742; *Bruce v. President*, 19 Barb., 371.)
3. The alleged nuisance is under municipal control. (Lou. City Code, chap. 22, sec. 53; chap. 22 and chap. 19, sec. 15.)

And if under municipal control, no injunction will be granted. (High on Inj., sec. 745.)
4. No adequate remedy at law must be alleged. (High on Inj., 745.)
5. No injunction will be granted when the benefit to public outweighs inconvenience of individuals. (High on Inj., 742.)
6. No injunction will be granted to prevent injury that is eventual and contingent. (High on Inj., secs. 742, 774; *Dumesnil v. Dupont*, 18 B. M., 800; *Hahn & Harris v. Thornberry*, 7 Bush, 406.)
7. The long acquiescence is a sufficient reason for denying the injunction. (*Louisville Coffin Co. v. Warren*, 78 Ky., 406.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The plaintiffs, some twenty-five in number, filed their action in the Louisville Law and Equity Court, setting up that they were in the possession as owners and tenants of certain premises in proximity to a lot and the improvements thereon, owned by the defendants, and situated on Main and Rowan streets, between Twenty-second and Twenty-fourth streets, in the city of Louisville; that the last-named property had originally been owned by one Nomberger, who resided on it until in about 1872, when it became

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the property of Bloom & Ullman, who had it occupied by tenants for residences until in March, 1879, when they leased it to one Brohm for the term of ten years, to be used by him as a pleasure resort and beer garden; that Brohm erected certain frame structures on the premises, consisting of a dancing hall, a ten-pin alley, bar-rooms, open air orchestra stands, and other improvements, at a cost of some six thousand dollars, but failing, in 1880, to comply with his contract, Brohm surrendered the premises to the former owners, Bloom & Ullman, who thereupon, and continuously up to July, 1890, rented them to various persons for the purpose of conducting therein a pleasure resort and beer garden; that "during the ten years since the lot has been used as a place of entertainment, it has, from the nature of the business conducted therein, become and been a nuisance to the citizens who owned and rented residences in the neighborhood." That crowds gathered there during these years, and "the guests would dance in the dancing hall to the music of string and brass bands stationed in the hall and in the open orchestra-stand in the garden until the hours of morning, while others would amuse themselves by rolling ten-pins in the ten-pin alley; and the noise made by the stamping of feet of the dancers, by the directions to the dancers given in loud stentorian voice, by the instruments of the orchestra and by the balls of the ten-pin alley would keep the neighbors and their families awake or disturb their sleep for several nights in the week, so as to endanger and impair the health of the more nervous members of the families, and destroy their comfort and peace and

render impossible the quiet enjoyment of domestic life." That crowds of idle and disorderly spectators were drawn by the music, and their habitual presence in the streets became to the neighbors a source of annoyance and a nuisance, all of which occurred, not by reason of any careless or disorderly management of the place by those in charge, but necessarily out of the character of the business conducted there. That from July, 1890, until June, 1891, the premises were not put to this use; that in June, 1891, the plaintiffs and others in the vicinity, learning that Bloom & Ullman had rented the garden to a certain society for June 24 for a picnic, filed a remonstrance with the common council of the city against the issuance of a license to hold such picnic, in consequence of which no license was granted. That thereupon, Ullman and the other owners promised that if the remonstrances were withdrawn, they would not in the future use the place as a pleasure resort; that the objection was thus withdrawn and the picnic held, since which time the premises have not been so used. That recently learning that the defendants, who are brewers, were negotiating for the property, [they informed them of the agreement as to the use of the property, and warned them not to buy it for the use of a beer garden; that notwithstanding this the defendants have bought the lot and improvements and have given out in speeches and threatening that they would reopen the garden as a pleasure resort and beer garden; that if permitted to do so, the reopening of the place "as a beer garden and pleasure resort will again disturb the peace, comfort and happiness of the



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plaintiffs and of their families and endanger and impair the health of themselves and their families, and will render their lives during the spring, summer and autumn months miserable." That as long as "the garden and the improvements now standing in the same, are used for the purpose of a pleasure resort, for which they are adapted, or if similar structures are erected and used in similar manner, the said garden is bound to be a continuous annoyance and cause of discomfort to the people residing in the neighborhood within the distance of two squares from the defendants' lot, no matter with how much regard for the comfort of the neighbors the defendants may conduct the place." That irreparable injury will happen to them unless an injunction be granted against the threatened nuisance.

We have thus given in some detail the substantial averments of the petition, because a demurrer thereto filed by the defendants was sustained by the court and the petition dismissed. The sufficiency of this pleading is, therefore, the only question involved.

We observe, first, that it is not an actual, existing nuisance of which complaint is made, nor are the things about to be done in themselves nuisances. There can be beer gardens and pleasure resorts, music and dancing, and yet no nuisance set up. Admittedly, the conduct of such exercises or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less eligible as a place of residence for people who pay high rents, or are of "dainty modes and habits of living" (Wood's Law of Nuis-

ances, section 800); but, nevertheless, these places and modes of amusement are not to be condemned or denounced as nuisances in themselves.

"Injunctions against *threatened* nuisances," says Mr. Wood, section 797, "will seldom be granted except in extreme cases where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results."

The learned author, in support of this view, refers to the case of *Dumesnil v. Dupont*, 18 B. M., 804, where this court quotes with approval this language of Lord Brougham, in the case of the *Earl of Ripon v. Hobart*, 1 Cooper's Ch. Cases, 333: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere. \* \* It is also very material to observe that no instance can be produced of the interposition, by injunction, in the case of what we have been regarding as an eventual or contingent nuisance." And the court declined to interfere with the erection of a powder house within a few hundred yards only of the dwelling of complainants, notwithstanding the plaintiff's case was strongly fortified by the argument that, as "the electric fluid, the irresistible effects of which are disclosed in every thunderstorm, may, in defiance of every precaution, at any moment, cause it to explode, it cannot be doubted that if five hundred kegs

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were stored in a magazine in the heart of the city, every thunderstorm would awaken an universal alarm and consternation in the minds of the inhabitants." (Cheatham v. Shearon, 1 Swan's Rep., 213.)

A much stronger appeal was thus presented to the court than we have in this case. It is at last but the fear or apprehension of danger or injury that is being urged: "When the injury complained of is not *per se* a nuisance, but may or may not become so, according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere. Thus the erection of a wharf, a railroad bridge, a planing mill, a stable, a cotton-gin, a blacksmith shop, a toll-gate, a livery stable or a turpentine distillery will not be enjoined when the injury is only a possible and contingent one." (High on Inj., section 743.)

A bowling alley, billiard-room, or like place of amusement kept for gain or hire, may or may not be a nuisance according to the nature of the amusement, the manner in which the place is conducted, and its location. (Wood, section 43.) A ten-pin alley kept for public use in a village, in connection with a lager beer saloon, was held not a nuisance *per se*. (State v. Hall, 32 N. J. L., 158.) A slaughter-house, tallow factories and melting houses, soap factories, fat boiling and bone boiling establishments, have been held to be *prima facie* nuisances. It would seem from the authorities, therefore, that the opening of the grounds under consideration as a pleasure resort and beer garden is not of itself a nuisance. Whether the management may make it such is problematical.

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The nuisance sought to be restrained is eventual and contingent. That when opened before, it became a nuisance, is not determinate and satisfactory evidence that it will so become in the future. It is not even alleged that it will be conducted like it was before.

In *Hahn & Harris v. Thornberry, &c.*, 7 Bush, 403, it is held that the chancellor will not interfere by injunction when the nuisance sought to be abated or restrained is eventual or contingent, nor when the evidence is conflicting and the injury to the public or to the individual complaining, doubtful.

In *Louisville Coffin Company v. Warren, &c.*, 78 Ky., 400, the maintenance of a smoke-stack which caused "much annoyance and discomfort by the smoke and soot" issuing therefrom, was held not to be a nuisance. One living in a city, it was said, must necessarily submit to the annoyances which are incidental to city life. In *Rhodes v. Dunbar*, 57 Penn. St., 274, it was well said by the learned Chief Justice: "It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy, employed or unemployed citizen to constitute a city. They all have rights, and the only requirement of the law is, that each shall so exercise and enjoy them as to do no injury in that enjoyment to others or the rights of others."

Among the rights to be enjoyed, indeed we might say necessary to be enjoyed, by a large class of persons in a crowded city, is the right or privilege of

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attending places of open air amusement, such as are sought to be condemned in the petition. Undoubtedly, if the operation of these grounds become a nuisance, the chancellor will, if there be no remedy at law obtainable by complainants, interfere in their behalf.

We can not say now that the objectionable floors may not be so deadened as to prevent the noise complained of, or that the voice of the dancing director may not be "toned down," or the music made less harsh. There is nothing in the state of case set up in the petition rendering this improbable. Of course, the idle and disorderly crowd of "hangers on" may easily and summarily be disposed of on complaint to the municipal authorities.

Judgment affirmed

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CASE 99—PETITION EQUITY—SEPTEMBER 21.

Carter v. McDaniel.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. A WIDOW IS NOT ENTITLED TO DOWER IN A REMAINDER OR REVERSIONARY INTEREST of the husband in land where there was no seizin by the husband in fact or in law at any time during the marriage. Therefore, where a husband who was entitled to the reversion in land upon the termination of a dower interest died before the death of the dowress, his widow was not entitled to dower therein; and this is true, although he was in possession of the land prior to the allotment of dower, as he held the possession subject to the permanent right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession by virtue of that right he stood in the same attitude that he would have done if he had lost the right of possession by a superior title.

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2. THE PURCHASER OF A DOWER INTEREST in land having remained in possession after the death of the dowress, he is liable to the heirs for rent from that time.

## LIEBER &amp; LINCOLN FOR APPELLANT.

1. James T. McDaniel was not seized with title in or possession of the lands in his lifetime, and, therefore, his widow is not entitled to dower therein or the rent thereof. There must be actual possession or right of possession in the husband during his lifetime to entitle his widow to dower. (*Butler v. Cheatham*, 8 Bush, 594; *Gassaway v. Woods*, 9 Bush, 72; *Eustache v. Rodaquest*, 11 Bush, 47.)
2. The heirs of James T. McDaniel are not entitled to any rents whatever as against appellant, as he was a tenant in common with them. Where one co-tenant occupies the common property he is not liable to account to the other tenant in common either for rent or for a share of the profits unless there is an express agreement that he shall do so. (*Wilcox v. Wilcox*, 48 Barb., 327; *Schneider v. Taylor*, 16 Lea. (Tenn.), 304.)

## JAMES P. GREGORY AND R. REID ROGERS FOR APPELLER.

1. This appellee is entitled to dower.

The homestead of Ashbrene McDaniel was abandoned. (10 Bush, 279; 11 Bush, 232; 13 Bush, 442; 14 Bush, 101; *Idem*, 585.)

But even if this were not true, the homestead exemption would not be such an estate as to prevent the dower of appellee attaching to the interest of her husband, as the homestead exemption is not an estate in land. (12 Bush, 405.)

2. Where one of several joint tenants occupies land in severalty, he must account to the other joint tenants for their proportion of the rents and profits. (*McClanahan v. Henderson*, 3 Mar., 391; *Graham v. Graham*, 6 Mon., 562; *O'Bannon v. Roberts*, 2 Dana, 55.)

## CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

Harrison McDaniel died intestate in 1875, leaving Ashbrene McDaniel, his widow, and James T., Ida May and Wesley McDaniel, children. Harrison McDaniel's administrator filed a suit for the settlement of his estate as insolvent. Ashbrene McDaniel, the widow, intervened by cross-petition, asking the allotment of dower in her deceased husband's land. About forty-eight acres were allotted to her, and

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the balance of the land was sold to pay the debts of the deceased. After the allotment of dower, the widow sold the same to the appellant Carter, who held the possession of it until her death, which was in 1890. He also held the possession of it after her death. In 1876 James T. McDaniel mortgaged his undivided interest in said land to the appellant to secure the payment of one hundred dollars and interest, at the rate of ten per cent. At the time of the allotment of dower, said James was in the possession of said tract of land and was forced to surrender the possession of the dower right by order of the court. His death occurred before that of Mrs. Ashbrene McDaniel, the appellant being in the possession of the dower land at the time. To the appellant's suit to foreclose said mortgage, the widow and heirs of James T. McDaniel resisted his right to recover, the widow claiming dower and the heirs their interest, and that the appellant was liable to them for rents. A trial of the case resulted in the dismissal of the appellant's petition and judgment over against him for rents.

The objection to the mortgage that the dower interest is not sufficiently described is not well taken; for the mortgage does mortgage James T. McDaniel's undivided interest in his father's land, which includes any and all interests that he owned therein, whether in possession, reversion or remainder. Was the widow of James McDaniel entitled to dower in the said reversionary interest of her husband? It is well settled by this court that where there is no seizin in fact or in law by the husband at any time during

marriage in a remainder or reversionary interest, his widow is not entitled to dower therein. (See *Butler v. Cheatham*, 8 Bush, 594, and the cases there cited.) But the widow contends that inasmuch as her husband held the possession of the land before dower was allotted, that that fact entitles her to dower. We do not think so, because he held the possession subject to the superior and paramount right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession of the same by virtue of this paramount right, the inchoate right to dower therein ceased. He stood in the same attitude that he would have done if he had lost the right of possession by a superior title.

The appellant having held the possession of the dower after the death of Mrs. Ashbrene McDaniel, he is responsible to the heirs of James McDaniel for the rent of the same as long as he held it after her death.

The case is reversed, with direction to subject one-third of the dower interest to the appellant's mortgage debt, and if he has lost the right to interest on the debt to disallow the same, and to disallow the widow's claim to dower, and to offset the appellant's debt with the amount of rent that may be due the heirs, and for further proceedings consistent with this opinion.



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CASE 100—PETITION EQUITY—SEPTEMBER 23.

## Moore v. Offutt.

## APPEAL FROM CAMPBELL CHANCERY COURT.

1. CONSTRUCTION OF DEVISE—TIME OF VESTING OF INTEREST.—Under a devise to a person to be paid over when the estate is settled and debts paid the interest vests at once, only the time of possession being postponed.
2. SAME.—Where a deed of trust made by a father for the purpose of disposing of his estate among his children as directed in his will, provided that after the payment of debts the trustee should settle the accounts among his children, and in making the settlement one-half of whatever was coming to them should be paid them in money, and the other half invested in productive real estate, the title to be taken to them for life, remainder to their heirs, and further provided that "if at the time the equalization takes place any of my children are dead, no investments will be made for their children, but the amounts coming to them will be paid them in equal proportions," each of the children took an estate for life in one-half of his share and the fee in the other half; and although one of the children died before the equalization was made, or the estate of the grantor settled, he had the right to dispose, by will, of the half of his part of the estate in which he took the fee, that being a vested interest.

## O'HARA &amp; BRYAN FOR APPELLANTS.

1. The grantor's son Barry had no such vested estate in the trust property as he could devise by will, and his children take under the deed and not under his will the one-sixth interest which would have accrued to him had he survived the period at which it might have become vested in him. (Berry, Trustee, v. Williamson, &c., 11 B. M., 245.)
2. By the will of Barry Taylor his surviving wife can not take dower in the one-half of the sixth of the estate granted to the children of Barry, as that goes to those children by the deed of trust, and not by descent from Barry Taylor.

## SIMRALL &amp; BODLEY FOR APPELLEES.

Barry Taylor took a vested estate in fee in one-half the property given him under the deed of trust, and a life estate in the other half, with remainder to his heirs (2 Minor's Institutes (3rd ed.), p. 410 (side-

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page 357); *Mercantile Bank of New York v. Ballard*, 88 Ky., 488; 2 Chitty's Blackstone, 169, note 10.)

Courts of equity always favor the vesting of estates. (*Perry v. Greenville*, 80 Ky., 618.)

## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Col. James Taylor, of Newport, Kentucky, prior to his death, and with a view of making a disposition of his estate between his children, as provided in his will, executed a deed of trust to one Wm. H. Lape, conferring upon the trustee large powers in reference to the sale of his realty. He first declares that all of his real estate conveyed to the trustee *shall be chargeable with his debts*, and the latter is empowered to sell so much of his lands as may be necessary for that purpose. The trust further provides: "After my debts are paid by my trustee, he will take the advance book and settle the accounts among my children and the children of my son James. In making the settlement, whatever is coming to Barry and my daughters, *one-half will be paid them in money*, and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever."

"When the matter of advancements is settled, after paying all cost and expenses incident to the management of the estate, the surplus or whatever remains of the sale of real estate, or what may be coming from any other source, will be divided into six equal parts *and invested for and paid over to my children* and the children of my son James and their mother in the same manner as provided for in the accounts of equalization. If at the time the equal-

ization takes place, any of my children are dead, no investments will be made for their children, but the amounts coming to them will be paid to each in equal proportions."

The grantor of the trust had five children living, and one, a son James, dead, at the date of the deed. His plain purpose seems to have been to equalize his children in the distribution of his estate, and to see that this was done in his lifetime, reserving to himself a competency until his death.

The question in this case arises from a will made by Barry Taylor, a son of the grantor, who died after his father, by which he attempts to dispose of the estate conveyed to him, or to the trustee for his benefit, by the deed of trust to Lape.

Barry Taylor, the son, had been twice married, having one child by his first wife and two children by his last wife. At his death he made a will, by which he disposed of his interest in the trust estate to his last wife and her children.

Logan Taylor, the child of the first wife, contends that under the provisions of the deed of trust to Lape the whole estate, at his father's death, passed to his children, or that his father had no interest in the trust estate, he dying before the equalization was made or the estate of the grantor settled and his debts paid.

We have set forth so much of the deed of trust as affects the question involved, and it seems to us it is plain, by the terms of the deed, that Barry Taylor, the son of the grantor, took a vested interest in the one-half of the one-sixth of the estate and a

life interest in the other half. The language used is plain and unambiguous, and made still more so by subsequent provisions of the same instrument. His purpose was to secure one-half of Barry's interest to his (Barry's) children at his son's death, and this having been done by giving Barry, as to this half, a life interest, the grantor then provides that when the matter of advancements is settled the estate will be divided into six equal parts, *and invested for and paid* over to my children, and the children of my son James and their mother, in the same manner as provided in the accounts of equalization. Now the provision in reference to the accounts of equalization gives one-half to Barry in fee and the other half to him for life, remainder to his children.

The deed further provides that "*if at the time the equalization takes place any of my children are dead, no investments will be made for their children*, but the amounts coming to them will be paid to each in equal portions." His object was to secure the one-half to Barry's children, and, therefore, he required the investment of this one-half to be made by the trustee, giving to Barry an estate for life with remainder to the children, but Barry having died, no investment was necessary or required by the trust, because in express terms it is stated that no investment in that event is to be made, but the sum to be invested only if Barry should be alive.

The object of the trust in securing the one-half interest to the child of the deceased son or daughter having been accomplished, there was no necessity for the investment.

The grantor further provided by this trust, to enable his children to live, that the trustee should pay over to the children annually the sum of two thousand dollars each, as they will need money before distribution and investments can be properly made.

The grantor evidently supposed that much time would elapse before his large landed estate could be sold, and before an account of advancements could be taken, and, therefore, required the trustee to pay over to the children this two thousand dollars annually.

The right of Barry Taylor to demand of the trustee Lape, his (Barry's) half of the one-sixth interest, could not arise until the debts of the grantor were settled and the account of advancements made. These matters the trustee had to ascertain, and before he could distribute, but this did not make the interest of Barry in the one-half of the one-sixth contingent. It was a vested interest, to be received into possession and enjoyed after the happening of certain events that must take place. A devise to the son of one-half of an estate to be paid over when the estate is settled and debts paid vests in the devisee an absolute estate. The time of possession is only postponed and nothing more.

It has been said by both Blackstone and Kent, and often quoted, that "it is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which makes the distinction between a vested and contingent interest."

The chancellor, in our opinion, properly held that Barry Taylor had a vested interest in the one-half

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of the one-sixth of the estate, and could, therefore, devise it. The fact that the grantor had provided in his will for the child of Barry by his first wife can not affect the construction given the trust deed. The other provisions of the trust must alone control, and the child by the first wife, Logan Taylor, takes only an interest with his half-brothers in the one-half of the one-sixth that was held by their father for life. (*Mercantile Bank of New York v. Ballard's ass'ee*, 83 Ky., 481.)

Judgment below affirmed.

## CASE 101—PETITION ORDINARY—SEPTEMBER 23.

## Curtis v. Louisville City Railway Company.

## APPEAL FROM PIKE CIRCUIT COURT.

## 1. STREET RAILWAYS—MISTAKE OF DRIVER IN MAKING CHANGE.—

Where a street-car driver authorized to make change on behalf of the company delivered to a passenger a package in which there was a shortage of five cents, to which his attention was called, the passenger must be regarded as having paid his fare of five cents, and the driver had no right thereafter to eject him for his failure to put an additional fare in the box, although a rule of the company requiring passengers to put their fares in the box is reasonable, and a passenger may ordinarily be ejected from the car upon his refusal to comply with the rule. Therefore, the company is liable to the passenger for the damages sustained by him in consequence of being ejected from the car.

## 2. SAME—EVIDENCE IN MITIGATION OF DAMAGES.—A request made by the driver of the passenger to adjust the matter with the company was competent to go to the jury in mitigation of damages.

## 3. EVIDENCE.—What occurred after the plaintiff left the car should not go to the jury unless it was done by defendant's authority.

## W. O. HARRIS AND THOMAS LAWSON FOR APPELLANT.

Brief withdrawn.

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**HUMPHREY & DAVIE FOR APPELLEE.**

1. The rule of the company requiring a passenger to put his fare in the fare-box, and forbidding fares to be paid to the driver, is a reasonable and valid rule, necessary to protect the company, and to enable it to prevent losses and frauds, and to perform its public service. (*Reese v. Pa. Railroad*, 17 American State Reports, 820; *McGowan v. Morgan county*, 17 American State Reports, 416.)
2. As the change belonged to the driver and not to the company, the handing of the fifty cents to the driver for change was no more a payment of fare than seeking change of another passenger would have been; and if the driver, by mistake, did not give back the full amount of change, it was a matter between Curtis and the driver, and not a matter between Curtis and the company. (*Railroad Co. v. Mays*, 4 Indiana Appellate Reports, 418; *Hall v. Memphis Railroad*, 15 Federal Reporter, page 57.)
3. If there was a mistake in the amount of the package of change that the driver handed Curtis, it was an honest difference of opinion, and the driver offered to hand Curtis an additional five cents at once if Curtis would stop by the company's adjacent office and explain matters so as to likewise protect the driver from loss. This reasonable offer of the driver and the unreasonable refusal by Curtis were properly admissible in evidence; to show the good faith of the driver and the litigious motive of Curtis, and the want of any aggravating circumstances to enhance the damages beyond a nominal amount. (*Bradshaw v. South Boston Railroad*, 46 American Reports, 481; *Hufford v. Grand Rapids Railroad*, 58 Michigan, 118; *Townsend v. New York Central*, 15 American Reports, 419 (56 New York, 296); *Frederick v. Marquette Railroad*, 26 American Reports, 581 (87 Michigan, 842); *Yorton v. Milwaukee Railroad*, 41 American Reports, 23 (54 Wisconsin, 234); *McKay v. Ohio Railroad*, 26 American State Reports, 918 (84 W. Va., 65); *Shelton v. Lake Shore Railway*, 29 Ohio State, 214; *Chicago Railroad v. Griffin*, 68 Illinois, 504; *Peabody v. Oregon Railroad*, 21 Oregon, 121; *L. & N. R. R. v. Wilsey*, 3 Kentucky Law Reporter, 1010; *Atchison & Topeka R. R. v. Gantz*, 38 Kansas, 608; *Mosher v. St. Louis Railroad Company*, 28 Fed. Rep., 826; *Mahoney v. Detroit R. R.*, 98 Michigan, 612; *Hall v. Memphis R. R.*, 15 Fed. Rep., 57; *Brown v. Memphis R. R.*, 7 Fed. Rep., 51; *Hall v. Memphis R. R.*, 9 Fed. Rep., 586; *McGee v. Oregon R. R.*, 46 Fed. Rep., 734; *Southern R. R. v. Hinsdale*, 88 Kansas, 507; *Southern R. R. v. Rice*, 38 U. S., 898; *De Lucas v. New Orleans R. R.*, 38 La. Ann., 980; *Hutchinson on Carriers*, sections 580 to 598; *Beach on Railways*, section 896; *Wood on Railways*, section 859.)
4. The driver and the company are in no event responsible further than for causing Curtis to leave the car. His subsequent arrest and im-

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prisonment by the policeman for disorderly conduct were not by the authority, or with the knowledge, of the driver or the company. (Cunningham v. Seattle R. R., 8 Washington Reports, 471; Railway Company v. Donahoe, 56 Texas, 162; St. Louis Railway v. Trimble, 54 Arkansas, 854.)

5. The verdict of one thousand dollars on the first trial was properly set aside by the court below, because it was palpably excessive; the plaintiff, Curtis, being entitled to only nominal damages, if any. (Beach on Railways, section 892; Terre Haute R. R. v. Van Atta, 74 American Decisions, 96; C. & N. R. R. v. Peacock, 48 Ill., 257; Southern R. R. v. Hinsdale, 88 Kansas, 507; Staples v. Schmidt, 26 Atlantic, 198; Alabama R. R. v. Gibbs, 72 Miss.; Booth's Street Railway Law, 410.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant took passage on the defendant's street car, to be conveyed from his house to his law office in the city of Louisville. The fare was five cents. The appellant, not having the exact change, handed the driver a fifty cent piece in coin, and requested the change for it. The driver gave him a package of nickels marked fifty cents. The appellant immediately, and in the presence of the driver, though his attention at the time might have been directed to the front, counted the nickels, and they were short five cents, and while still in the driver's presence and with the nickels in his hand, he called his attention to the shortage and demanded the correct change. The car driver not denying the shortage, refused to give the appellant the correct change, saying that he had received it at the appellee's office just as it was, at fifty cents, and that if there was a shortage the company must correct it, not he. He then requested the appellant to put five cents fare in the box, and when the car reached the next station, which was but a few minutes run, the office would correct



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the mistake, and that he, the driver, would go with him to the office and make a statement in reference to the mistake. The appellant declined to put the five cents in the box or to pay in any way an additional sum, saying that the driver having refused to give him back the correct change, had retained the fare and that he would not pay it again. Thereupon, the driver called a policeman and caused him to eject the appellant from the car. The appellant brought this suit to recover damages. The first trial resulted in a verdict for one thousand dollars in damages, which was set aside by the court, and on the second trial the court instructed the jury peremptorily to find for the appellee. The appellant appeals.

By the rules of the appellee a passenger that gets on a street car must deposit his fare in the box within one block. The driver must not receive the fare, &c. When it is necessary to enforce the rules or to preserve order the driver may call to his assistance a policeman. These rules are reasonable, and the appellant was aware of them. The question is, was he, under the circumstances, excusable for not putting the nickel in the box as required, and was the driver inexcusable for ejecting him on account of his refusal?

The appellee furnishes its drivers with change fixed up in small sums in packages for the accommodation of passengers in the payment of their fare. The drivers are charged with the change, and any shortage in the sum with which they are charged falls upon them, unless corrected by the company. It seems that the fear of the driver that the company would

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not make good to him the shortage, and that the loss would fall upon him if he made up the shortage, caused him to prefer that the company should make the correction.

It admits of no doubt, from the evidence, that the package contained a shortage of five cents. Now, as said, the appellee's rules were reasonable, and if a passenger refused to comply with them, the appellee would have the right to expel him for non-compliance. But the question is, could the driver, who was authorized to make change on behalf of the appellee and for its benefit, as well as that of the appellant, retain a nickel by mistake belonging to him, and then compel him to put the fare—another nickel—in the box, because the rule of the company required the appellant to put his fare in the box? Now the appellant had placed the nickel in the hands of the driver, and he was authorized, under the rules, to put it in the box. He received the half dollar and retained five cents too much, the amount of the fare, and he would not give it to the appellant, but required him to pay his fare in addition. The retention of the five cents was, under the circumstances, a payment of the fare which the driver could have put in the box had he desired. But whether he put it in the box or not did not concern the appellant, because he had paid his fare and was entitled to his ride. The mistake as to the amount that was in the package was that of the appellee and not that of the appellant; and this court adheres to the rule intimated in *Wilsey v. L. & N. R. Co.*, 83 Ky., 511, which is sustained by other cases, that if a passenger has paid

his fare and the company fails to furnish him with proper evidence of the fact, he is nevertheless entitled to his ride, because the mistake is that of the company and the passenger ought not to be prejudiced by it, and that the company is responsible for any damages that the passenger sustains in consequence of being ejected by the company. The request of the driver to adjust the matter is competent to go to the jury in mitigation of damages, and what occurred after the appellant got off the car should not go to the jury unless it was done by the appellee's authority.

The judgment is reversed, &c.

CASE 102—INDICTMENT—SEPTEMBER 28.

Johnson v. Commonwealth.

APPEAL FROM PIKE CIRCUIT COURT.

1. **INSTRUCTION AS TO SELF-DEFENSE.**—Upon the trial of appellant for murder the court did not err in instructing the jury that they could not acquit, upon the ground of self-defense, if they believed from the evidence, "that at the time of the killing of deceased the defendant brought on the difficulty with him and sought his life." While the intention with which the difficulty was "brought on" must be submitted to the jury in order to prevent such an instruction from misleading, and that intention must be to kill or seriously injure, yet in this case the felonious intent with which the difficulty must be believed by the jury to have been brought on sufficiently appears from the use of the words, "and sought his life."
2. **SAME.**—Although the killing took place on the premises of accused, he was not prejudiced by an instruction telling the jury that they could not acquit on the ground of self-defense, if he had any "other safe or apparently safe means of escape or protection," as there was

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at the only time when defendant could, if ever, have reasonably believed himself to be in danger, manifestly no possible avenue of escape from the danger, and it is evident that the jury thought he was never in any danger from which he was required to escape.

8. **PREJUDICIAL ERROR.**—An instruction telling the jury they were the judges of the character and credibility of the witnesses was not prejudicial, as the effort of the Commonwealth to impeach the character of defendant's witnesses resulted in establishing overwhelmingly their reputation for truth and veracity.
4. **THE COURT DID NOT ERR IN REFUSING A CONTINUANCE** on account of the absence of witnesses, as the trial was had four years after the indictment was found, and the affidavit disclosing what the absent witnesses would testify was read as a deposition.
5. **IMPEACHMENT OF ABSENT WITNESSES.**—It was not error to allow the Commonwealth to impeach the reputation of the absent witnesses, as their testimony was placed upon the same footing as that of witnesses who were present.

**STEWART & STEWART FOR APPELLANT.**

1. The qualification of the instruction as to self-defense was erroneous. (Thompson v. Commonwealth, 18 Ky. Law Rep., 39; Allen v. Commonwealth, 86 Ky., 642.)
2. Appellant being on his own premises was not bound to flee, and the court erred in telling the jury, in substance, that he had no right to stand and defend himself if there was any other apparently safe means of escape. (Bledsoe v. Commonwealth, 9 Ky. Law Rep., 1002; Wright v. Commonwealth, 8 Ky. Law Rep., 718.)
3. It was error to instruct the jury that they were judges of the character and credibility of the witnesses. (Wright v. Commonwealth, 8 Ky. Law Rep., 728.)

**WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

1. The court properly instructed the jury that the defendant could not be acquitted on the ground of self-defense if he himself brought on the difficulty, or placed the deceased in an attitude in which he was bound to defend himself. (Oder v. Commonwealth, 80 Ky., 32; Lightfoot v. Commonwealth, *Idem*, 516; Farris v. Commonwealth, 14 Bush, 362.)
2. The defendant was not prejudiced by the refusal to continue on account of the absence of witnesses, as he obtained the benefit of their testimony by reading, as their depositions, the statements contained in the affidavit for a continuance. (Crim. Code, sec. 189, Amendment of May 15, 1886.)
3. It was not error to allow the Commonwealth to impeach the absent witnesses.

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**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The appellant was indicted for the murder of William King at the February term, 1889, of the Pike Circuit Court. At the March term, 1893, he was put upon trial, convicted and sentenced to the penitentiary for life. Assigning various errors, he has appealed to this court.

It appears that the accused had a still-house, where he made brandy. King was his neighbor, and appears to have frequented the place—at times getting something to drink and at other times failing. Appellant was in dread lest King would report him to the marshal, and the proof is abundant that he had, on several occasions, threatened to kill the deceased. On the day of the killing, when he saw King coming, he said, "There comes a damned dangerous man," alluding, as we gather from the proof, to the danger of being reported to the marshal. Several persons had gathered there on that occasion (Sunday morning), and were engaged in drinking brandy. Appellant said during the morning that "that day's work would ruin him." He was also heard to say that morning, "I'll be d—d if Bill King shall bother me any more." He got into a row with one Maynard, in which King acted as peace-maker. He said to King that "if he was a friend of Maynard, he was no friend of his." King answered that he was a friend of both. He "gave King the d—d lie" twice or more. This was down at a gate some distance from the still-house. Appellant then invited King to go and get a drink, and they walked off, arm in arm, both drunk, or drinking, and so indeed were all the parties present.

Johnson had a gun and a pistol. King was wholly unarmed. After getting perhaps a hundred yards from the gate, Johnson was seen to pat his cheek at King, and was heard to say by one witness nearer than the others, "Hit me if you dare." He did this two or three times, when King knocked him down with his fist, and was standing over him quietly, with his head hung down, but making no demonstration or effort to do any thing further. He had nothing in his hands. Johnson, after falling, and while on his back, fired with his pistol, striking King in front, who thereupon fell. He died the next morning.

The defendant proved that on several occasions previous to the killing, King had threatened to kill him, and on one or two occasions had made some effort to do so, and on the day of the trouble called him a damned liar. He testified that King knocked him down, and he knew nothing for a short time, and when he recovered consciousness he saw King stooping over him with a rock in his hand in a threatening attitude, and is corroborated by his daughter, and perhaps another witness. This is not corroborated, however, by the other witnesses. The appellant complains of all the instructions given, but most seriously of the qualification of his right of self-defense as given in the fourth.

By the first, second and third instructions was given the law as to murder, manslaughter, and what the finding should be in case of doubt as to the degree of guilt.

By the fourth they were told that mere threats made by the deceased to take the defendant's life

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would not excuse or justify the defendant in taking the life of King, unless they should believe from the evidence, that at the time Johnson killed King, if he did kill him, defendant believed and had reasonable grounds to believe that King was about to carry out said threats and take his life, or inflict on him great bodily harm, and that there was no other safe means, or apparently safe means, of protection or escape, but to kill King, and if the jury so believed and find, they should excuse him on the grounds of self-defense and apparent necessity, and find him not guilty, "unless the jury should further believe from the evidence, that at the time of the killing of King, the defendant brought on the difficulty with him and sought his life, and if they should so believe they can not excuse or acquit him upon the grounds of self-defense or apparent necessity."

In a subsequent instruction the law as to reasonable doubt was given.

It is contended that this court, in *Allen v. The Commonwealth*, 10 Ky. L. R., 582, held that the jury should be required to believe beyond a reasonable doubt "that the accused *willfully* brought on the difficulty with the deceased for the *purpose* and with the *formed design* to kill him or inflict serious injuries on his person, before they were authorized to deprive the accused of his right of self-defense."

It is argued that the difficulty may have been "brought on" with no felonious or unlawful intent, or even innocently, and such indeed has been the criticism of this court in several recent cases on both the form and substance of instructions similar to this

one. The expression "brought on" has been said to give the jury too much latitude—to leave out of view the intention upon the part of the accused and the manner of bringing on the difficulty. In quite a recent case it was held to be probably prejudicial to the rights of the defendant, because he had gone to the house of the deceased, when an altercation occurred which finally resulted in the defendant killing his antagonist. It was thought the court indicated to the jury, by his merely going there, innocent though he was of any intention to harm the deceased, that this was "bringing on" the difficulty in the broad meaning of the instruction. Therefore, it was said that the intention with which the difficulty was brought on must be submitted to the jury. That intention must be to kill or seriously injure, and must be confined to the immediate occasion of the killing. In the present case, the jury were required to believe that the accused brought on the difficulty at the time of the killing and was then and there seeking *the life* of the deceased, before they could deprive him of the right of self-defense. There was no circumstance in proof prior to the killing in which the accused figured as an innocent factor, and yet which might have been thought by the jury to have brought on the difficulty and by which the jury might have been misled. The felonious intent with which the difficulty must be believed by the jury to have been brought on, sufficiently appears from the use of the term "and sought his life." And manifestly these terms were not misunderstood. Though not strictly or legally so apt, they are suggestive to the ordinary mind of most nefarious design.



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To seek a man's life is the embodiment of criminal intent, and suggestive of the foulest assassination. And that the accused thus "sought the life" of King at the time of killing him, the jury are told to believe before depriving him of right of self-defense. Moreover, when the Commonwealth established the fact that the accused had threatened to take the life of the deceased, it was not then a question merely of his necessary self-defense that was before the jury. His whole previous conduct towards the deceased and declarations concerning him were under scrutiny, and by these evidences of hostility and enmity, the intention of the accused was properly gathered at the time of the fatal meeting.

Under the facts submitted to the jury in this case, we think it impossible for the jury to have been misled by this instruction. By a subsequent and independent instruction the defendant was given the usual law of self-defense without qualification.

It is further urged, on the authority of *Bledsoe v. Commonwealth*, 9 Ky. L. R., 1002, that the instructions should not have been qualified by the expression "other safe or apparently safe means of protection or escape;" that as the killing was on the premises of the accused, as in the *Bledsoe* case, he was not bound to flee, but had the right to stand and defend himself. But the merest glance at the evidence will show that these words of qualification were not misleading. If ever applicable, it was when the defendant was on his back on the ground. If there was ever a time when he was in danger, or could have reasonably believed himself to be in danger, it was

when he was knocked down, and there was then manifestly no possible avenue of escape from the danger. It is evident the jury thought that he was never in any danger from which he was required to escape, and so found him guilty of murder.

Instruction six as to the jury judging of the character and credibility of the witnesses was not prejudicial. The effort of the Commonwealth to impeach the character of some of the defendant's witnesses, while it affected their general moral character to some extent, resulted in establishing overwhelmingly their reputation for truth and veracity.

The motion for a continuance was properly overruled. The indictment was found in February, 1889, and the defendant was brought to trial some four years thereafter. The affidavit disclosing what the absent witnesses would testify was read as a deposition; nor did the court err in allowing the Commonwealth to impeach or attempt to impeach the reputation of the absent witnesses. Their testimony was placed on the same footing as that of witnesses who were present and their characters subject to the same tests.

We think that the defendant obtained a fair trial, and the judgment is affirmed.

Simpson v. Simpson's Ex'rs.

CASE 108—PETITION EQUITY—SEPTEMBER 28.

## Simpson v. Simpson's Ex'rs.

APPEAL FROM SPENCER CIRCUIT COURT.

1. **ANTE-NUPTIAL CONTRACT SET ASIDE FOR FRAUD.**—The parties to an ante-nuptial contract stand in a confidential relation, requiring the exercise of the utmost good faith. Therefore, there must be a full disclosure of the circumstances and property of each, and if the provision secured to the wife is manifestly unreasonable and disproportioned to the means of the husband, it raises a presumption of intended concealment, and throws upon him the burden of disproving that presumption.

Two days before the date fixed for a marriage the husband called upon the wife and proposed a marriage contract, to which she consented. Thereupon he sought a lawyer, who prepared a contract according to his dictation, which was signed by the wife, who stated after it was read to her that she understood it. After the contract was signed, the husband insisted, and the wife yielded to his entreaties, that the marriage should take place the next morning before the arrival of the wife's friends, who were expected not only to witness the ceremony, but to bring with them the wedding garments. It does not appear that the wife had any information as to the value of the husband's estate, which amounted to fifteen or twenty thousand dollars, or that she was informed as to her marriage rights. Her estate, in which the husband relinquished all interest, amounted to only one hundred dollars. By the contract, the only interest she was to have in the husband's estate upon his death was the use for life of a cottage, worth not more than a thousand dollars. The husband was a shrewd business man, while the wife was uneducated and without business experience. In this action by the wife after the husband's death to set aside the contract—*Held*—That the chancellor should have granted the relief sought.

2. **GIFTS TO CHILDREN IN FRAUD OF WIFE'S RIGHTS.**—As advancements made by the husband to his children were not greater in amount than a man of his means had the right to make to his children, they were not a fraud upon the wife.

**G. G. GILBERT FOR APPELLANT.**

1. The contract relied upon by appellees should be set aside upon the ground that appellant was overreached and defrauded in its execution. (*Woodward v. Woodward*, 5 Sneed, 50; *Bierer's Appeal*, 92 Pa. St., 266; *Kline v. Kline*, 57 Pa., 120; *Kline's Estate*, 64 Pa., 122;

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- Pierce v. Pierce, 71 N. Y., 157; 6 Ky. Law Rep., 740; Hair v. Hair, 10 Rich., S. C.; Viele v. Judson, 82 N. Y., 324; Bull v. Rowe, 13 S. C., 355; Leather Manufacturing Bank v. Morgan, 117 U. S., 96; Forwood v. Forwood, 9 Ky. Law Rep., 417; s. c., 86 Ky., 114; Markland Co. v. Kimmel, 87 Ind., 560; Janeson v. Janeson, 66 Ill., 259; Griffen v. Nichols, 51 Mich., 575.)
2. The husband having persistently disregarded the contract during his life, his representatives cannot insist upon its enforcement after his death. (Woodward v. Woodward, 5 Sneed, (Tenn.) 50.)

## FAIRLEIGH &amp; STRAUS FOR APPELLEES.

1. There is nothing in the record upon which any fraud can be predicated in the first instance, and certainly nothing upon which this court would be warranted in setting aside the finding of the chancellor.
2. The contract in this case, under all the circumstances surrounding the parties, was reasonable, just and equitable. But even if not, the chancellor has no power to refuse to enforce an ante-nuptial contract merely because he may regard its provisions inequitable. (Forwood v. Forwood, 86 Ky., 114.)

## L. A. WEAKLEY OF COUNSEL ON SAME SIDE.

## JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This action in equity was instituted in the Spencer Circuit Court by Mattie S. Simpson, the appellant, against the executor and devisees of the last will of her husband, John R. Simpson, for the purpose of canceling an ante-nuptial contract made between the appellant, whose maiden name was Mattie Swope, and John R. Simpson, the testator, on the evening preceding their marriage. The provisions of the will were renounced by the appellant, and she now claims she is entitled to dower and her distributable share of the personalty of her husband's estate, upon the ground that the marriage contract is a nullity.

The marriage contract was entered into on the 16th of July, 1888—was signed and acknowledged by both parties and recorded. The marriage took place the

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day after the contract was entered into, and the parties lived together as man and wife until his death in September, 1891, and this action instituted in October of that year.

The husband, at the date of the marriage, was possessed of an estate of fifteen or twenty thousand dollars, and the wife's estate not exceeding in value one hundred dollars. He was about sixty-eight years of age, and was a shrewd business man, and from the proof in this case economical to an extent that deprived his wife at least of the comforts and necessities of life; converted his wife into a cook soon after the marriage; clothed and controlled her as one would the most abject menial in his service. The wife, at the date of the marriage, had passed the age of fifty, was uneducated and without any business experience.

The testator, her husband, at the date of the marriage, had two children, both sons, and each with a family, and in comfortable pecuniary circumstances. The agreement to marry having been entered into, the day fixed for its consummation was Thursday, the 17th of July, 1888. The friends of the appellant, who lived in Louisville, were invited to the wedding, and were having such clothing made for the appellant as suited the occasion. On the Tuesday preceding the day the marriage was to take place, in the evening, the testator called on the appellant, and suggested the making of a marriage contract, to which the appellant, it seems, assented. He left the house, and in a short time returned with his lawyer, who had prepared the contract in his office as directed by the testator, and had it read over once to the

appellant, and being asked if she understood it, and her response being "*yes*," the parties both signed it, and the clerk being present, took the acknowledgment and recorded the instrument. As soon as the contract was signed, and the witnesses to it had retired, the testator insisted on their marriage taking place at five o'clock the next morning (Wednesday), the day preceding the day to which the friends had been invited. Her wedding outfit had not been sent from Louisville, but still the testator was persistent, and the woman compelled to marry, as the testimony shows, with such scanty clothing as would doubtless have proved distasteful to those of less mature years than the parties to this alleged agreement. At the time this contract was signed, or before, there was no explanation made to the appellant as to the nature of the marital rights she was about to surrender, or the character and extent of the estate of the testator. He was reputed by some to be a man of wealth, and known by all business men in his town to have been, at the time, in independent circumstances; but still his estate was invisible, or composed mostly of cash and cash notes, and when dealing with this inexperienced and uneducated woman, it was his duty not only to have explained to her what rights she was surrendering, but to develop to her, approximately at least, the value of his estate.

His lawyer doubtless supposed that the parties understood each other, and wrote as directed by the testator, and while no blame is to be attached to him, still here was a shrewd business man with his counsel on the one side, and an illiterate, uneducated woman

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on the other, the latter parting with all of her marital rights in an estate worth fifteen or twenty thousand dollars, for the use of a house and lot worth not exceeding one thousand dollars, for her life only, and the relinquishment by the husband of his interest in her estate that had no value to it. No one of her friends present to advise with her on the subject, and the wedding hastened before friends could arrive to witness the ceremony, and bring with them the wedding garments. Why such haste? Was it the fear that those of her friends more intelligent than the appellant, should arrive and give to the appellant the advice she was entitled to have in the first place? The parties were not dealing at arms length, and while marriage contracts, when entered into in good faith and without fraud or imposition, will be upheld in equity, however inadequate the pecuniary consideration, as said by the court in *Pierce v. Pierce*, 71 New York, 157: "The authorities go very far in holding that the courts require strong proof of fairness when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. The rule undoubtedly is that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a subsisting agreement."

In *Bierer's* appeals, reported in 92 Pa. State, 266, the contention was as to the validity of an ante-nup-

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tial contract between Everhart Bierer and Ruth Shaw. The court said: "It is a sound rule that parties to an ante-nuptial contract do not, like buyer and seller, deal at arms length, but stand in a confidential relation, requiring the exercise of the greatest good faith. There must be a full disclosure of the circumstances and property of each. If the provision secured to the wife is manifestly unreasonable and disproportionate to the means of the intended husband, it raises a presumption of intended concealment, and throws upon him the burden of disproving that presumption." Bierer, in that case, was worth about sixty thousand dollars, and Ruth without property of any value. It was agreed that in thirty days after his death she was to be paid five dollars, and that whatever property she had or might acquire should remain hers. In consideration of this she released her marital rights. It was shown in that case that the parties lived in the same neighborhood for many years, and the circumstances of each were known, to some extent, to the other, but the court held that this general information was insufficient to prove knowledge approaching correctness of the value of his property, and that it was not such a contract as a court of equity should enforce.

The case before us presents as strong facts and circumstances, regardless of the testimony of the appellant, much of which is incompetent, for refusing to enforce this agreement as the case of Bierer's appeals. In each case the evidence of fair dealing that must characterize all such contracts is wanting, and here it is manifest that this woman, if advised by friends, or



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if of sufficient intelligence to have known her marital rights, would never have entered into a contract that reduced her to a mere menial, and left her at the death of her husband in the possession of a little cottage, disrobed of its furniture, and she penniless for the means of support and maintenance. On the evening of the execution of the contract, with her wedding day fixed and her friends invited, she was powerless to resist the will of one so vastly her superior, and to whom she had pledged her affections upon the promise that he would protect and care for her during life; as powerless at that time as she was to resist, after the contract was signed, his importunities to marry him, in the absence of her friends, at five o'clock the next morning. She was subordinated to his will, as the facts show, both before and after marriage. She surrendered to him, in a short time, on his demand, the keys of the pantry and the meat house, and was supplanted in every thing that pertained to her domestic duties, and even handed over to him, at his instance, the small sums of money that were derived from the sale of her vegetables in the garden. It is a case of the exercise of an unlimited and tyrannical control by the husband over the wife's action from the date of the marriage contract until his death.

The case of Forwood v. Forwood, reported in 86 Ky., 114, is relied on by both sides as authority in this case. In that case the allegations made by the wife were denied, and no proof whatever taken, and this court said: "If it appeared the appellant was inveigled into making this contract by unfair means, such as taking advantage of her ignorance,

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her affections, or concealing the truth from her, we would not hesitate to set the contract aside. But such a case does not appear. She fails to allege she did not know the nature and legal effect of the contract, nor does she allege she did not make it freely and voluntarily." "It is clear," the court further said: "that she understood its meaning, for the proof is clear she was a woman of intelligence and possessed a clear and cool judgment, and she knew that her intended husband was a man of reputed wealth, and three years after her marriage she stipulated in writing, drawn by herself, that she was not entitled to dower in her husband's realty, because she had relinquished it by the ante-nuptial contract."

The cases are entirely dissimilar, with the exception that each purports to be an ante-nuptial contract. After a most careful reading of the record, we have no hesitation in concluding that the appellant was imposed on by her intended husband, and that with promises of relieving her from the burden of a daily labor that was necessary by reason of her poverty, she was induced to become his wife and to execute a contract that is full of fraud, as shown from the facts connected with its execution.

There are some averments in the petition as to monies or property the testator had advanced his children, with a view of defeating the claim of the wife for dower and distribution. We think a man of his means had the right to give to his children the sums alleged, and that this was no fraud on the wife. As to the property, including lands, choses in action, money, &c., belonging to him at his death,

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the widow is entitled to dower and her distributable share as widow. The ante-nuptial contract is directed to be canceled, and the marital rights of the appellant enforced.

The judgment is reversed, and the case remanded for proceedings as herein indicated.

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CASE 104—MOTION—SEPTEMBER 26.

## Nelson v. Commonwealth.

APPEAL FROM GREEN CIRCUIT COURT.

THE MANDATE OF THIS COURT, IN A CRIMINAL CASE, MAY ISSUE IMMEDIATELY upon the decision of the appeal, as the provision of the Civil Code that no mandate shall issue, nor decision become final, until after thirty days from the day on which the decision is rendered, applies to civil cases alone.

JEFF HENRY FOR APPELLANT.

WM. J. HENDRICK FOR APPELLEE.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

Section 760, Civil Code, provides: "That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered," &c.

Section 336, Criminal Code, provides as follows: "The appeal is taken by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the Court of Appeals shall, thereupon, issue a certificate that an appeal has been taken, which shall

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Stuart, Trustee v. Commonwealth.

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suspend the execution of the judgment until the decision upon the appeal."

It will be observed that the Civil Code is peremptory that no mandate in a civil action shall issue, nor decision become final thereon, until after thirty days from the day that the decision was rendered. That this provision applies to civil cases only, is made manifest by the fact that in criminal cases the clerk's certificate suspends execution of the judgment "until the decision upon the appeal" only. As section 760 of the Civil Code applies to civil cases only, and as there is no such provision in reference to criminal cases, but not penal, it follows that in case of an affirmance of a judgment of conviction the mandate may issue immediately.

Let the mandate in this case issue.

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CASE 106—APPEAL TO CIRCUIT COURT—SEPTEMBER 28.

Stuart, Trustee v. Commonwealth.

APPEAL FROM PIKE CIRCUIT COURT.

**TAXATION OF MINERAL INTERESTS.**—Where one person owns the surface estate in land and another person the mineral interests, each of these interests is real estate, and the mineral estate may be taxed as any other real estate.

C. M. PARSONS AND J. M. ROBERSON FOR APPELLANT.

Land and the undeveloped minerals in or on it cannot be separately taxed. The land includes the minerals. (Gen. Stats., chap. 92, art. 1, secs. 1, 3, 4, 6, 7, 27; Cooley on Taxation, p. 227, and Notes; *Idem*, p. 225, 241, 267, 268, 269; People v. Parks, 58 Cal., 624.)

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Stuart, Trustee v. Commonwealth.

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WM. J. HENDRICK, ATTORNEY-GENERAL, AND CONNOLLY & CONNOLLY FOR APPELLEE.

The judgment should be affirmed. (Gen. Sats., chap. 92, art. 1, secs. 1, 8, 4, 7, 9.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

By this proceeding the estate proposed to be taxed is the mineral estate of the appellant, which he holds by separate title, another holding the surface title. It is settled by this court that an estate in fee carries with it all metals and minerals thereunder, but the surface and the mineral interests may be conveyed to different persons and become separate property, and each interest conveyed, if the minerals are conveyed in place, will be land. In other words, the minerals and the surface interests may, by separate conveyance, become separate pieces of real estate, and held by different persons, and each estate may be separately seized and sold by execution, and each may be defeated by the statute of limitations as any other real estate. (See Kincaid, &c., v. McGowan, &c., 88 Ky., 91, where the matter is fully discussed.) The mineral estate, when severed by conveyance, being separate real estate, may be taxed as other real estate.

The judgment is affirmed.

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Snellbaker v. Paducah, &c., R. Co.

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CASE 106—PETITION ORDINARY—SEPTEMBER 30.

**Snellbaker v. Paducah, &c., R. Co.**

APPEAL FROM M'CRACKEN COURT OF COMMON PLEAS.

A REGULATION OF A RAILROAD COMPANY REQUIRING A PASSENGER ENTERING A TRAIN WITHOUT A TICKET TO PAY TWENTY-FIVE CENTS EXTRA FARE, this sum to be refunded upon the presentation to any ticket agent on the road of a "rebate check," furnished by the conductor, was not unreasonable; and where a passenger, with knowledge of the rule, and with knowledge of the fact that there was no ticket office at the station for which he was destined, failed, before starting on his journey, to buy a round-trip ticket, which he knew he could procure, he can not complain that upon his return he was ejected from the train on his refusal to pay the twenty-five cents extra fare required by the regulation of the company.

**C. H. THOMAS FOR APPELLANT.**

While a carrier of passengers may, in good faith, with a view of facilitating business, adopt a rule which requires a traveler to purchase a ticket before entering upon his journey, and upon his failing to do so may charge and collect additional fare, when paid on the train, yet, as a condition precedent, it is the duty of the carrier to establish a depot at a convenient place, and provide it with tickets and a ticket agent, who shall be in his office ready and willing to wait on the traveler who may call for a ticket, a reasonable length of time before the departure of the train. (Hutchinson on Carriers, 2nd ed., sec. 571; Porter v. The Railroad, 34 Barb., 358; De Lamaus v. The Railroad, 15 Minn., 49; St. Louis, &c., Railroad v. Myrtle, 51 Ind., 566; State v. Hungerford, 39 Minn., 6; Everett v. Railroad Co., 69 Iowa, 15; Chicago, &c., R. Co. v. Parks, 18 Ill., 460; St. Louis, &c., R. Co. v. Dolby, 9 Ill., 358; Chicago, &c., R. Co. v. Flagg, 48 Ind., 364; Nellis v. The Railroad, 80 N. Y., 505; Ill. Cent. R. Co. v. Johnson, 67 Ill., 312; Ill. Cent. R. Co. v. Cunningham, 67 Ill., 316; Missouri Pac. R. Co. v. McClannahan, 66 Texas, 530; Southern R. Co. v. Hinsdale, 38 Kansas, 507; Brown v. Railroad Co., 38 Kan., 634; White v. Railway Co., 26 W. Va., 800; Hall v. Railway Co., 25 S. C., 564; Thompson on Carriers, 319; Jeffersonville R. Co. v. Rogers, 28 Ind., 1; Chase v. The Railroad, 26 N. Y., 523; Croker v. The Railway Co., 24 Cow., 249; Wilsey v. L. & N. R. Co., 88 Ky., 511.)

And the same rule applies with reference to a rebate ticket that applies with reference to an additional fare when paid on the train.

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Snellbaker v. Paducah, &c., R. Co.

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(Poole v. The Railroad, 16 Oregon, 261; Reese v. Penn. R. Co., 181 Pa. St., 422; 19 Atl. Rep., 72.)

**REED AND HUSBANDS & HUSBANDS FOR APPELLEE.**

The appellant, by hailing the train at a point where trains stopped only as a matter of grace, and taking passage, with a knowledge of the regulation of which he now complains, thereby tacitly agreed to comply with the rule, and failing to do so the conductor was authorized to put him off the train.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Upon his refusal to pay the conductor of the appellee twenty-five cents in addition to the usual fare between the station at which he took passage and that of his destination on the line of appellee's road, the appellant was ejected from the passenger coach of the appellee. He sued for damages, and upon a trial of the case, the jury found a verdict for the appellee. The appellant's motion for a new trial, based upon various grounds, having been overruled, he has appealed to this court.

The facts established by the proof and necessary to be considered by us in testing the accuracy of the instructions of which the appellant seriously complains, are about these: Upon the completion of its road in 1890, the appellee established a number of stations between Paducah in this State and Paris, Tenn., these being its terminal points. Some of these were ticket stations and others not, being known as mere flag stations. A rule or regulation was promulgated when it began business, and of which notice was given, to the effect that passengers entering the train without tickets would be required to pay twenty-five cents extra fare. This sum, however, was to be refunded to them upon presenting to any ticket agent

on the road, what was called a "rebate check," which was to be furnished the passenger by the conductor when he collected the cash fare.

Of the location and nature of these flag and ticket stations, and of this rule of the appellee, the appellant, from the proof, had ample knowledge. He was a large lumber dealer, quite a traveler, and, from his own statements, had studied this rebate question. In a discussion with some of the employes of the appellee a few days only before he embarked on the trip resulting in his expulsion from the train, he had declared that the rebate system was unlawful, and that every man who had been put off for non-payment of this excess had recovered damages. Round trip tickets were kept for sale at Paducah and other ticket stations for all points on the road, and of this the appellant must have known, as he had traveled over this road, and on divers occasions had gone out from Paducah to flag and ticket stations thereon, using on one or more trips "the rebate check." He resided at Paducah, and on the morning of June 4, 1891, bought a ticket to "Oaks," the first station south of that city, and some nine and one-half miles distant. Upon his request he was allowed, without further charge, to go on to Burkholdersville, about one and one-half miles further, where a large saw-mill was being operated, and where he had business. After transacting his business, he started to walk back to Oaks, the regular flag station, when he was informed by Judge Burkholder that he intended flagging the train at the mill, and he could then take passage.

He did so, and when he was approached on the train



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Snellbaker v. Paducah, &c., R. Co.

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for his fare he offered the usual sum to the conductor. Some discussion ensued, the conductor explaining his situation and the necessity for obeying the rules of his superior officers, and the appellant insisting that he knew the law of the case and his rights in the premises. The dispute ended in the courteous expulsion of the appellant from the train, without rudeness or violence, beyond the gentle laying of the conductor's hands on the appellant's arm and politely helping him down the steps of the train, at or near "Oaks," from which point the appellant walked to Paducah and instituted his action.

Upon this state of case the court instructed the jury to find for the plaintiff, unless they believed, from the evidence, that the appellee had adopted the rule or regulation, the nature of which we have explained, and that return or round-trip tickets were kept for sale at Paducah, for "Oaks," and that the appellant, prior to his trip, knew of the rule and of the fact that such tickets were kept; in which event they were to find for the appellee. An additional instruction defining the measure of damages was given, and one charging them to find only actual damage if they believed that the appellant had purposely taken passage on the train in order to be ejected, and for the purpose of instituting suit. The first instruction is the only one we need notice.

If the appellant, before starting on his trip, knew that he would be required to pay twenty-five cents extra upon being found without a ticket, either as he went to or returned from "Oaks," and that he could purchase at Paducah, if he desired, a ticket

to Oaks and back, and thus avoid this deposit of twenty-five cents, upon what principle shall he be allowed to complain of his failure to buy a return ticket? Certainly upon none, unless the requirement of the regulation is unreasonable. Whatever knowledge may be attributed to him of the location of these stations and of the rules and regulations of the company, he is not bound to comply with them if they are oppressive or unreasonably inconvenient to him. But what is there unreasonable or oppressive in this rule? The passenger does not, in fact, pay a cent additional fare, and the inconvenience of presenting his "rebate check" at the end of his journey and getting his money, is not more than the inconvenience of paying his money and getting his ticket when he starts on his trip; and that he may be required to so purchase his ticket before entering the train is admitted on all hands. Even additional fare is allowed to be collected and retained if a passenger fails to provide himself with a ticket when he can do so. It constantly occurs that when round trip tickets are on sale and a careless passenger fails to buy one, and his co-traveler does buy, the one pays more than the other for being carried the same distance. In this case the appellant actually paid no more, and only subjected himself to a very slight inconvenience, while to the road the rule was obviously of great pecuniary importance.

But it is urged that there being no ticket station at Oaks, the appellant could not have bought a ticket en route home, and ought not to be inconvenienced

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by not having one. The answer is, there was a station at the starting point, at which, by the purchase of a ticket, the supposed inconvenience could have been provided against. We are not considering a case where a passenger has not had an opportunity to provide himself with a ticket. The Oregon and Pennsylvania cases, relied on by appellant, were such cases. On many of the great trunk lines of the country the collection of this excess is omitted under the express provisions of the regulation, when passengers are taken on at "non-ticket" stations, or when children or infirm persons are traveling alone and do not have money sufficient to pay the excess. There are no circumstances surrounding the appellant which render the application of this rule to him unreasonable or harsh. Ordinarily, the prompt compliance with the reasonable requests of these carriers conduces largely to the safety of the traveler, and we hesitate to interfere with rules which, by facilitating the business of the company, inures in the end to the benefit of the public.

The burden of proof was properly placed on the company. It admitted the expulsion, and pleaded facts authorizing it, which were denied by the plaintiff. The rulings of the court as to the pleadings and on the competency of the proof were substantially correct. On the whole case, upon the law and facts as they appear in this record, the finding of the jury could not have been otherwise.

Judgment affirmed.

## Whitley County Land Company v. Lawson.

CASE 107—PETITION ORDINARY—SEPTEMBER 30.

## Whitley County Land Company v. Lawson.

APPEAL FROM WHITLEY COURT OF COMMON PLEAS.

1. **CONFLICTING PATENTS—ADVERSE POSSESSION.**—Where there are conflicting patents for land, and the junior patentee enters upon and holds the actual possession of a part of the interference, claiming the interference to the extent of his patent boundary, the senior patentee not being in the actual possession of his land at the time of such entry and occupancy, the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside the interference does not give him the actual or constructive possession of any part of the interference, nor does his entry upon and occupancy of the interference give him the possession of it except to the extent of his inclosure.
2. **SAME.**—Where a conveyance covers several pieces of land that are distant from each other, the possession of one in the name of the whole does not give the owner actual possession of the whole.

## HILL &amp; DENHAM FOR APPELLANT.

1. Such patents as the one to Clapp, notwithstanding the fact that it excludes several thousand acres of land previously legally surveyed and patented, have been sustained by all recent decisions of this court. (Hall v. Martin, 11 Ky. Law Rep., 241; Moses v. Gatliff, &c., *Idem*, 356.)
2. One can not have possession of land not patented in such a way as to avail himself of such possession anterior to an older patent. (Chiles v. Calk, 4 Bibb, 554.)
3. Appellee's possession will be limited to his actual close. (Brooks v. Clay, 3 Mar., 545; Smith v. Morrow, 5 Litt., 211; Hunter v. Christman, &c., 6 B. M., 465; Trimble v. Smith, 4 Bibb, 257.)
4. Appellee's possession could not by construction be extended beyond his enclosure even though his possession were within the interference. (Davidson, &c., v. Coombs, 5 Ky. Law Rep., 815.)

## LESTER &amp; KING FOR APPELLEE.

No brief in record.

## CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant claims the land in controversy, under a patent granted by the Commonwealth in 1876, for

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forty-eight thousand and forty acres of land. The patent includes about one hundred and six thousand acres, but the quantity above named is all that is patented. The other is excluded because previously patented. The boundary calls to run with county lines, &c. The appellee claims a small piece of land by patent, which is junior in date to that of appellant, and by adverse possession for fifteen years. The appellant's patent covers the appellee's said land. The appellee has only occupied a small strip of the land claimed by him for fifteen years.

The appellant was not in the actual possession of any part of its survey at the time the appellee's occupancy commenced, nor has it entered upon any part of the interference since then, and taken possession of it. The question is, does the appellee's actual possession of a part of the interference and claiming to the extent of his patent boundary, give him an actual possession of the whole and oust the appellant's constructive possession? The court instructed the jury that if the appellee's patent covered the land claimed by the appellant, and the appellee had, for fifteen years before the bringing of this suit, been in the actual occupancy of a part of said land within his patent boundary, claiming to the extent of said boundary, they ought to find for the appellee, which the jury did.

When there are conflicting patents for land, and the junior patentee enters upon and holds the actual possession of a part of the interference, claiming the interference to the extent of his patent boundary, and the owner of the senior patent is not in the actual possession of his land at the time of such entry and occupancy by the junior patentee, then

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the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside of the interference does not give him the actual or constructive possession of any part of the interference; nor does his entry upon and occupancy of the interference give him the possession of it, except to the extent of his inclosure. (See *Fox v. Hinton*, 4 Bibb, 559, and *Ware v. Bryant*, 14 Ky. L. R., 852.)

There was no actual possession of any part of the appellant's survey at the time the appellee entered upon and took the possession of the interference. But if we are mistaken as to the appellant being in the actual possession of some one of the pieces of land covered by its patent, for the patent covers many pieces that are not only separate, but many miles apart, it is certain that the appellant, or those under whom it claims, held no actual possession of any part of that piece now the subject of controversy at the time the appellee entered upon a part of the interference, and we think that no one will dispute the proposition that an entry upon one piece of land, and in the name of the whole, under a conveyance that covers several distinct pieces that are distant from each other, as in this case, does not give the owner the actual possession of the whole.

We have treated the patent as valid in passing upon this case, because the parties have treated it as valid, but we do not wish to be understood as passing upon its validity. That matter is not passed upon. The instruction quoted, according to the undisputed facts of this case, is correct.

The judgment is affirmed.

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Coe v. Commonwealth.

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CASE 108—INDICTMENT—SEPTEMBER 30.

## Coe v. Commonwealth.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

**INDICTMENT FOR MANSLAUGHTER.**—The fact that an indictment for manslaughter charges that the offense was committed "maliciously" does not render the indictment bad on demurrer, as the word "maliciously" is to be regarded as surplusage, it being charged in the same sentence and connection that the offense was committed "in a sudden affray."

**ALLEN & ALLEN FOR APPELLANT.**

The facts and circumstances alleged in the indictment do not constitute the offense of manslaughter, and, therefore, the demurrer should have been sustained. (Crim. Code, sec. 124; *Idem*, sec. 161, subsec. 2.)

**W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**

The indictment is sufficient. (Bishop on Crim. Proc., vol. 2, secs. 502, 514; *People v. Choiser*, 10 Cal., 310; *People v. Stevenson*, 9 Cal., 273; *Rex v. Mackalley*, 9 Co., 65, 67a; *Rex v. Briggs*, 1 Moody, 318.)

**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

The offense charged in the indictment in this case is manslaughter, alleged to have been committed by the accused unlawfully, willfully, *maliciously*, feloniously, *in a sudden affray*, and not in his self defense. The defendant filed a demurrer to the indictment, and also, after verdict of the jury, moved in arrest of judgment.

The only ground upon which a judgment may be arrested is, as prescribed in section 276, Criminal Code, that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

One of the grounds upon which, according to sec-

tion 165, a demurrer to an indictment may be sustained, is substantially the same as the one upon which a motion in arrest of judgment may be made, viz: That the facts stated do not constitute a public offense. But if the demurrer is proper in this case at all, it is because the indictment does not substantially conform to the requirements of article 2, chapter 2, title 6, of the Code.

Section 124 provides the indictment must be direct and certain as regards—1. The party charged ; 2. The offense charged ; 3. The county in which the offense was committed, and 4. The particular circumstances of the offense charged, if they be necessary to constitute a complete offense. The only cause for demurrer to the indictment in question that counsel urges is that the particular circumstances of the offense are not stated with that directness and certainty required by the Code ; for there can be no question but the offense of manslaughter is the one intended to be, and which is in terms, charged.

The circumstances of time, place and manner of the commission of the offense and also the person slain, are all stated with sufficient directness and certainty to show the court had jurisdiction to apprise the defendant of the particular homicide which he is called on to answer, and to constitute a bar, in case of conviction, to another prosecution for the same offense. But although the offense charged is manslaughter, the word "maliciously," used in describing the particular circumstances of the offense, indicates a state of mind under which murder, not manslaughter, is committed. Nevertheless, as the words "in a sudden affray," de-



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scriptive of manslaughter, occur in the same sentence and connection, the word "maliciously" is to be regarded as surplusage, and, therefore, in nowise affecting the indictment, otherwise sufficient, nor the substantial rights of the accused. For, while he might have been indicted for murder alone, and, upon failure of proof to sustain the charge, convicted of manslaughter under the indictment complained of, he could not have been possibly convicted of murder, as he was not. So that as the offense of manslaughter was charged and sufficiently described in the indictment, the word "maliciously" did not nor could either mislead or prejudice the accused, and consequently should not be held to vitiate or impair the indictment.

In our opinion there was no ground for either demurrer or motion in arrest of judgment, and as we perceive no other error in the record, the judgment is affirmed.

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CASE 109—PETITION EQUITY—OCTOBER 8.

Young, &c., v. Morehead, &c.

APPEAL FROM ALLEN CIRCUIT COURT.

1. CONSTRUCTION OF DEVISE.—Immediately following a devise by a testator to his wife of "one-third" of his entire estate, real and personal, were the words: "That is, she is to have all the land during her life." By the next clause of the will the testator gave to his son "the remaining two thirds" of his estate, and by subsequent clauses provided, in the event of his son's death in infancy, his part was to go to his mother, and that at the death of the mother "all her aforesaid part" was to go to the son. *Held*—That the widow took a life

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Young, &c., v. Morehead, &c.

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estate in all the land owned by the testator, and not merely in one-third.

2. **DOWER AND HOMESTEAD.**—The remainderman having died before the life tenant, his widow is not entitled to dower or homestead.

**LEWIS McQUOWN FOR APPELLANTS.**

1. The widow took one-third of the land for life, and the son two-thirds in fee.

Where two clauses of a will, or two devises in a will, are repugnant, the clause which is posterior in local position must prevail. (Howard v. Howard, 4 Bush, 497.)

Where it is manifest that by reason of an omission the testator has not expressed himself as he intended to do, and it is certain beyond reasonable doubt what particular words were omitted, the omitted words may be supplied and the intention of the testator thus effectuated. (Aulick v. Wallace, 12 Bush, 585-6; 2 Jarman, pp. 60, 61.)

In the will in question here the omitted words are in substance, "devised to her," following immediately after the words, "all the land."

**W. E. SETTLE AND JOHN E. DUBOSE FOR APPELLEES.**

1. The widow of Alexander Stephens took all the lands for life and one-third in fee.  
2. The appellant is not entitled to dower or homestead. (Butler, &c., v. Cheatham, 8 Bush, 594.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

If, under the will of Alexander Stephens, who died in Allen county in 1852, his widow took an estate for life in his realty, then the son of the testator, who died before the widow, was not seized of any part thereof, and his (the son's) widow is not entitled to homestead or dower. If, however, the widow took an estate in only one-third of the realty and the son took the remaining two-thirds, as he lived on the land with his mother, his widow would be entitled at any rate to dower if not to a homestead. The will, after some preliminaries not necessary to notice, and omitting the fifth clause appointing an executor, is as follows:

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"*Secondly.* That I give and bequeath to my beloved wife, Mary Catharine, one-third of my entire estate, real and personal—that is, she is to have all the land during her life.

"*Third.* I give and bequeath to my son, James Crittenden, the remaining two-thirds of my estate.

"*Fourth.* If, in the event of my son's death in infancy, my will is, that his part go to his mother.

"*Sixth.* My will is, at the death of my wife, Mary C., then all her aforesaid part to go to my son, James Crittenden."

The appellants, who were the plaintiffs below, are the widow of James C. Stephens, son of the testator, and her present husband, Thomas L. Young. They insist that the widow of the testator, Mary Catharine, took an estate for life in only one-third of the estate. That this is shown in the succeeding clause giving the son "the *remaining* two-thirds." That the words "that is, she is to have all the land during her life," are words reducing or restricting the devise of one-third that stood as one in fee to a life estate. That the sentence was intended to read: "I give to my wife one-third of my entire estate, real and personal, but she is to have the land thus devised to her during her life only;" and that such must be the construction, if effect be given to the devise to the son of "the remaining two-thirds of the estate," a devise importing an immediate taking by him in fee.

However plausible this may seem and is, we are constrained to think that the words, "she is to have *all the land during her life*," mean just what they say. Having given her one-third of the estate, real

and personal, he remembers the infancy of his son, his dependence on his mother, and the fact that upon her will devolve his care and oversight, he *enlarges* his seeming original intention, and provides that she is to have *all* the land during her life. This gives her a home and the small farm of some one hundred and forty acres on which to sustain herself and son.

The remaining two-thirds given the son consist, necessarily, of two-thirds of the personal estate and is taken absolutely. It is all that is left. That which *remains* is what is left after the wife gets what is specifically given her. He gets two-thirds of the estate "remaining" undisposed of. Should the son die in infancy, "his part," which is two-thirds of the personalty, is given the mother, and upon her death, according to the sixth clause, her part goes to the son—in accord with the construction giving her a life estate with remainder to the son should he survive her. The son intermarried with the appellant, and died before coming into possession of this remainder interest, and hence she is entitled to neither dower nor homestead.

The only difficulty we have in adopting this construction lies in the fact that by it we restrict the devise to the son in the third clause to an interest only in two-thirds of the personalty; but when we consider the sixth clause in connection with it, giving him the whole after her death, we think the meaning of the testator becomes reasonably plain.

The suggestion is not without force that by the second clause the widow took one-third the land in fee, but was to have the whole land during life. Then

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the "remaining two-thirds" of the estate would consist of realty and personalty, though the son would take the realty subject to the life estate of his mother. The sixth clause, however, giving the whole of the wife's part to the son at her death, is inconsistent with her taking one-third in fee, unless, as suggested by counsel, the testator was making provision for the disposition of the wife's part in case of her death before his own, which is not improbable.

The only question here, however, is whether the widow took a life estate in the whole. The express words to that effect it seems to us must control, even though they be not perfectly reconcilable with the supposed meaning of some other clause.

Judgment affirmed.

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CASE 110—INDICTMENT—SEPTEMBER 7.

## Commonwealth v. Davis.

## APPEAL FROM GRAVES CIRCUIT COURT.

1. To CONVICT FOR FALSE SWEARING under the statute it is essential to allege in the indictment and prove on trial that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath; and these two facts can be properly shown alone by the record of the proceeding in which the false oath is alleged to have been taken.
2. VARIANCE AS TO DATE.—In a prosecution for false swearing, the date of the commission of the offense is not material, and, therefore, a variance between the indictment and the record of the proceeding in which the false oath is alleged to have been taken as to the date of the trial of that proceeding does not render the record incompetent as evidence.

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WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

The lower court erred in not admitting the record of the bastardy proceeding. The fact that the date did not correspond with that stated in the indictment was immaterial. (*Barnard v. Commonwealth*, 94 Ky.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee Will Davis, having been indicted for the offense of false swearing, and under a peremptory instruction of the court found by verdict of the jury not guilty, the Commonwealth prosecutes this appeal.

The circumstances under which the alleged offense was committed are stated in the indictment, substantially as follows: That upon trial in the Graves County Court of the cause of the Commonwealth against appellee, on a warrant charging him with being father of a bastard child, he appeared as a witness on his own behalf, and being duly sworn as such, did willfully, falsely and feloniously state and give in evidence that he never at any time had sexual intercourse with Lelia Sawyer, mother of said bastard child; whereas, in truth, he had, before testifying, such intercourse with her. Upon trial of this case, the Commonwealth offered in evidence duly authenticated record of the proceeding in the bastardy case against appellee, showing the trial, verdict and judgment of the county court. But objection was made and sustained by the lower court to said record as evidence upon the ground that trial of the bastardy case appears therefrom to have been pending and determined September 19, 1892, whereas it is alleged in the indictment such trial was had October 1, 1892. The Commonwealth then offered to prove the same facts

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by oral testimony, objection to which was made and sustained, because record evidence thereof was the best evidence. And as no other evidence was offered by the Commonwealth, verdict of not guilty necessarily followed.

To convict for false swearing under the statute it is essential to allege in the indictment and prove on trial that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath. (Commonwealth v. Powell, 2 Met., 10; Commonwealth v. Still, 83 Ky., 275; Richey v. Commonwealth, 81 Ky., 524.) These essential facts were all fully and sufficiently stated in the indictment. But it would not have been competent or available for the Commonwealth to prove the alleged false oath was knowingly and willfully taken, without first showing it was so taken on a subject concerning which appellee could be legally sworn, and before a person authorized to administer the oath. These two facts could be properly shown alone by the record, which the lower court rejected as evidence, and are fully shown thereby. And it seems to us it was error to sustain the objection made to the competency of that record as evidence, because whether trial of the bastardy case took place September 19, 1892, as appears therefrom, or October 1, 1892, as stated in the indictment, is not at all material, inasmuch as it appears from both that the alleged offense was committed before finding of the indictment.

The statement of facts was made in the indictment quite fully and explicitly enough to enable a

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Commonwealth v. Warren. Same v. Same.

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person of common understanding to know what particular offense was intended to be charged, and to enable the court, in case of conviction, to pronounce judgment that would bar another prosecution for the same offense. And the Criminal Code does not require a charge to be made in an indictment more directly or with a greater degree of certainty than that. We are utterly unable to see wherein the variance in date of the bastardy trial as stated in the indictment and shown by the rejected record could possibly defeat the right of the case, or prejudice that of appellee. Moreover, it has been expressly held by this court in *Richey v. Commonwealth*, 81 Ky., 524, that in a prosecution for false swearing, date of commission of such offense need not be alleged at all in the indictment, because not material.

In our opinion, the lower court erred to the prejudice of the Commonwealth in sustaining objection to said record as evidence, and this opinion is directed to be certified.

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CASE 111—INDICTMENT—SEPTEMBER 7.

Commonwealth v. Warren.

Same v. Same.

APPEALS FROM MARION CIRCUIT COURT.

1. TO CONSTITUTE THE OFFENSE OF OBTAINING THE SIGNATURE OF ANOTHER TO A WRITING BY FALSE PRETENSE the false pretense must be a statement of some pretended past occurrence or existing fact made for the purpose of inducing the party injured to sign the



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Commonwealth v. Warren. Same v. Same.

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writing. No statement or representation of any thing to take place in future is a pretense in the meaning of the statute, whether it be in the form of a promise or not.

One who induces another to sign a note upon the representation that it is to be used as a renewal of an existing note upon which the person signing is bound does not violate the statute, although he intends to and does use the note for another purpose.

2. **INDICTMENT.** The allegation in the indictment in this case that defendant falsely represented that the note to which he procured the signature "was a renewal" of an existing note, amounts to no more than an allegation of a promise to use it as a renewal; and as the fact that defendant represented that the note to be renewed was due when it was not due, could not have induced the signing of the alleged renewal note, the allegation of that fact does not bring the case within the rule requiring the "statement of some pretended past occurrence or existing fact."

**WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.**

The indictment is good, and the demurrer should have been overruled. (Bishop's Crim. Proc., vol. 2, title, False Pretense; *Barnard v. Commonwealth*, 94 Ky.)

**W. J. LISLE AND JNO. D. FOGLE FOR APPELLEE.**

1. To constitute a false pretense within the meaning of the statute, the representation must be as to a then existing or past fact in contradistinction to something to be done in the future. (*Wharton's Am. Crim. Law*, secs. 2118-2129; *Commonwealth v. Haughey*, 3 Met., 224; *Glackan v. Commonwealth*, *Idem*, 238.)
2. The statute does not include cases where the party defrauded has the means of detection at hand. (*Commonwealth v. Grady*, 18 Bush, 286.)

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The sufficiency of the following indictment is in question on this appeal:

"The grand jury of the county of Marion, in the name and by the authority of the Commonwealth of Kentucky, accuse William Warren of the crime of obtaining the signature of another to a writing, the false making whereof would be a forgery, by false pretenses, with the intent to commit a fraud, com-

mitted in manner and form as follows, to wit: The said William Warren, in the said county of Marion, on the 9th day of July, A. D., 1890, and before the finding of the indictment herein, did falsely pretend to A. Lee that two notes, to wit: negotiable promissory notes, promising to pay to the Marion National Bank of Lebanon, Kentucky, at the said bank, three hundred and fifty dollars each, and executed by said William Warren as principal and the said A. Lee as security, were then due, and the said William Warren did then present to the said A. Lee another negotiable promissory note, payable to the said Marion National Bank in Lebanon, Kentucky, dated 9th day of July, 1890, and due in four months thereafter, for seven hundred dollars, which said note was all drawn up in due form and signed by the said William Warren, and the said William Warren did then and there falsely represent and pretend to the said A. Lee that the said note so drawn up and signed by the said William Warren was a renewal of the former notes aforesaid, and by said false and fraudulent representations so made did obtain the signature of the said A. Lee as security to said note. Said first notes were not then due when said representations were so made, and said second promissory note was not a renewal note for said first two notes, and was not so used, but was made and prepared by the said William Warren, and at his instance, to satisfy other notes which he owed said bank, and which he did so satisfy other notes by exchanging said seven hundred dollars for two other notes which he owed, and upon which A. Lee was not bound, and said false representations were

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made by the said Wm. Warren with the intention to commit a fraud as aforesaid, and said second note and the signature of A. Lee were writings, the false making whereof would have been a forgery, and said false representations were feloniously made, and the said A. Lee as security and William Warren as principal at the time said false representations were made did owe said bank two notes for three hundred and fifty dollars each, all of which was contrary to the form of the statute," &c.

A demurrer to the indictment filed by the appellee Warren was sustained by the circuit court, and the Commonwealth has appealed, insisting that the indictment is a good one under section 2, article 13, chapter 29, General Statutes, which is as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

Obviously the false pretenses or representations attempted to be charged against the appellee are that the notes for three hundred and fifty dollars each were due when they were not due, and that the note for seven hundred dollars, when presented to Lee for his signature, was a renewal of the smaller notes, when it was in fact afterward used otherwise. Now, it is clear that Lee was not induced to sign the alleged re-

newal note upon the mere representation that the other notes had matured. If the representation had been that they would fall due on the next day, the same necessity would have existed for Lee's signature to the alleged renewal note. The statement as to the maturity of the paper was not a moving or controlling cause or inducement in obtaining the signature. It is in fact not so alleged in the indictment. It is apparent that the appellee obtained the signature of his friend to the new note by *the promise that it would be used in renewal* of the old ones upon which he was bound at the bank.

The language of the pretense, as laid in the indictment, that the note "was a renewal of the former notes," can intelligently mean nothing else than that it was intended to be used as such renewal note. Of course a note can not be a renewal of another note until it is signed by the obligor and delivered to the obligee, and by him accepted as such renewal. The plain meaning of the charge in the indictment is that after Lee should sign it, the note was to be delivered in renewal of the old notes, but that the appellee violated his promise and used it otherwise.

This is not a violation of the statute as has been repeatedly held by this court. "It is essential to a conviction for obtaining property or money under false pretense, to allege and prove that the pretense was a statement of some pretended past occurrence or existing fact, made for the purpose of inducing the party injured to part with his property. No statement or representation of any thing to take place in future is a pretense in the meaning of the statute, whether it

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be in the form of a promise or not." (*Glackan v. Commonwealth*, 3 Met., 233.)

The judgment sustaining the appellee's demurrer and dismissing the indictment is therefore affirmed.

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## CASE 112—PETITION EQUITY—SEPTEMBER 26.

## Ellis v. Dittey.

## APPEAL FROM KENTON CHANCERY COURT.

1. To ENTITLE THE HUSBAND TO CURTESY in the wife's land it is not necessary that she should in person have been in possession of the land at the time of her death; it is sufficient that another was in possession for her use
2. SAME—PLEADING.—The allegation by the husband in his answer that the wife died "owning and possessing" the land sued for is sufficient, if supported by proof, to sustain his claim to curtesy.

## A. C. ELLIS FOR APPELLANT.

Possession during coverture is necessary to support the claim of curtesy. (*Adams v. Logan*, 6 Mon., 179; *Vanarsdale v. Fauntleroy's heirs*, 7 B. M., 402; *Orr v. Holliday*, 9 B. M., 60; *Steinberger v. Wisdom*, 13 B. M., 469; *Conner v. Downer*, 4 Bush, 682; *Powell v. Gosson*, 18 B. M., 192; *Neely v. Butler*, 10 B. M., 50.)

## SIMMONS &amp; SIMMONS FOR APPELLEE.

Possession by another for the wife is sufficient to entitle the husband to curtesy. (*Sweeney, &c., v. Montgomery, &c.*, 85 Ky., 64-66; *Neely v. Butler*, 10 B. M., 50; *Carr, &c., v. Givens, &c.*, 9 Bush, 679.)

## JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant, claiming to be the owner and in the possession of about ten acres of land in Kenton county, brought this action to quiet his title thereto against the appellee, who is alleged to be setting up some kind of claim to the property. The plaintiff's

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title is derived by deed from one Joseph Marshall, who, through his mother, inherited the land from the infant child of the defendant Dittey. The defendant, by his answer, puts in issue the plaintiff's possession, and sets up ownership in himself as heir of his infant child. Afterwards convinced of his error as to this claim, he amends his answer, and claims as tenant by the curtesy.

As to the possession of the property at the time the suit was instituted, we think the proof is sufficient on plaintiff's behalf to show possession in him, and this, combined with the legal title, authorized him to sue. The real question in the case is whether the appellee, by himself or wife, had such possession of the land during coverture, as entitles him to curtesy.

In August, 1845, one James Dedman conveyed the land in controversey to Elizabeth McCollough for the recited consideration of two hundred dollars. This tract appears to have been bounded on one of its sides by a tract of some ten acres, owned by the grantee's father.

In 1847, Elizabeth, then living in Cincinnati, Ohio, intermarried with Dittey, the appellee, who lived in the same city. To them a child was born in December, 1848. Thereafter, in March, 1849, Elizabeth died, and in about August of the same year the child died.

Just who, if any one, occupied or used this land in 1845-6-7-8 is not clearly shown. There was no house on it, but there was one on the adjoining tract belonging to the father of Mrs. Dittey, and this is shown to have been occupied by him during his life-time, and by his wife afterwards. The latter died some thirty years

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ago. The two tracts then appear to have been "all in the same field," though at one time the tract in dispute was under fence, which, however, had rotted away some twenty odd years ago. The appellee never occupied the land or used it in person or by tenants; but if the wife was the owner and had possession of it during her marriage, it is sufficient to entitle the appellee to curtesy. The statute giving curtesy reads as follows: "Where there is issue of the marriage born alive, the husband shall have an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may be then seized to her use." Sec. 1, art. 4, chap. 52, General Statutes. The proof as to her possession is scant, but the appellee speaks of the land as that of which "his wife was in possession at the time of her death," though at that time, as appears in proof, she was a resident of Cincinnati, and her father was probably using it, or occupying his own land in the same enclosure with the tract in dispute. There is no hint of any adverse holding. She alone had a deed of record for it, or claimed it. We are, therefore, inclined to conclude that it was held for the legal title holder by those by whom it was actually occupied, and whose possession was, therefore, her possession, which satisfies the requirement of the statute. In Carr, &c., v. Givens, &c., 9 Bush, 680, neither the husband Givens, who was claiming curtesy, nor the wife, ever lived upon the land or exercised any acts of ownership over it, but on the death of the wife "her mother entered on the land, or retained the possession after the death of her husband, recognizing the right of the children as the owners in fee simple. Her pos-

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session was not adverse to the children, but only strengthened the common estate, and her possession and seisin were the possession and seisin of all." Possession by some coparceners, amicable to the others, was thus held to be a sufficient seisin in fact to invest and sustain an estate by the curtesy in the husbands of certain others not in the actual possession.

Still later, in the case of *Yankey, &c., v. Sweeney, &c.*, 85 Ky., 64. (1887), it was said that the reason of the rule requiring actual possession on the part of the husband being for the purpose of strengthening the wife's title, whenever its equivalent is complied with, then the rule is complied with. "For instance," says the court, "if the guardian of the wife holds possession of her land at the time of her death, then the reason of the rule is complied with and the husband is entitled to curtesy in the land. And if a joint tenant with the wife holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So, if a trustee of the wife holds possession," &c. "Indeed," says the court, "if any person at the death of the wife is seized of her land for her use, the reason of the rule is complied with, and the husband is entitled to curtesy."

Here the proof is the wife was in possession at the time of her death. The proof that she resided in Cincinnati at the time does not disprove the fact of her possession under the deed by her father or other person for her. If she died in possession, it was all the statute requires to entitle the husband to curtesy.

The amended answer asserts that the wife died own-



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Smith, &c., v. Norment, &c.

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ing and possessing this land,' and we think this is a sufficient allegation to meet the demands of the statute, and, in fact, is substantially in its language.

Judgment affirmed.

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CASE 113—PETITION EQUITY—SEPTEMBER 30.

Smith, &c., v. Norment, &c.

APPEAL FROM HENDERSON CIRCUIT COURT.

1. **IRREGULAR PARTITION OF LAND ACQUIRED IN FOR GREAT LENGTH OF TIME.**—In this action, by heirs for a division of land, to which defendants asserted a claim based upon adverse possession alone, the court will not inquire whether a partition, under which the ancestor of plaintiffs claimed, was made by the number of commissioners then required by the statute, that partition having been acquiesced in by the parties in interest for almost a century.
2. **EJECTMENT—JOINDER OF PLAINTIFFS.**—Defendants, as to whom this is to be regarded as a suit in ejectment, have no right to insist that separate actions should be instituted by plaintiffs in accordance with a division of the land already had, as plaintiffs had the right to repudiate that division and seek another partition.
3. **QUESTION FOR JURY.**—Whether the possession of appellants had ripened into a perfect title was a question for the jury, this being an issue out of chancery to try the question of title.

**R. H. CUNNINGHAM FOR APPELLANTS.**

1. There was a misjoinder of parties and of causes of action, and the court erred in refusing to require plaintiffs to elect. (Civil Code, sec. 83, and subsec. 4 of sec. 113; *Sale v. Crutchfield*, 8 Bush, 636.)
2. The objection to the deed of partition among the members of the firm of Richard Henderson & Co., of August 9, 1797, is that it was acknowledged before two justices of the peace instead of, as the law then in force required, before some court or the mayor of a city. (1 Litt. St. Laws, 368, sec. 3 of act Dec. 19, 1796; 1 A. K. Mar., 857.)
3. The deeds by Jones and Terry, commissioners, read by plaintiffs were incompetent, because the acts of March 1, 1797 (2 M. & B., 1068-9. 1 Litt., 689), and of Dec. 14, 1802, under which they purport to have been made, required that six commissioners should be appointed in-

## Smith, &amp;c., v. Norment, &amp;c.

stead of *two*, and required further that their acts should be reported to and confirmed by the court, and thereupon, under order of the court the deeds were to be executed. (*Hood v. Mathers*, 2 Mar., 553; *Williams v. Williams*, 3 Litt., 40; *Short v. Clay*, 1 Mar., 371; 6 Dana, 418; 7 Dana, 498.)

And no lapse of time could possibly validate them. (*Logan v. Steele*, 4 Mon., 438; *Nesbitt v. Gregory*, 7 J. J. Mar., 270.)

4. The court erred in its instructions to the jury in limiting the possession of Smith to his actual *enclosure*, thus excluding him from land that was cleared and cultivated for years, and notoriously claimed by him.
5. The mere fact that Smith, as commissioner in the division of the Hillyer lands in 1875, allotted a portion of that which he then and had for years previously held and claimed, did not divest him of the adverse possession. (*Boswell on Limitation*, p. 328, note 1; 23 Me., 417; 24 M. E., 29; 12 N. H., 9; 2 Gray, 568; 43 Vt., 462.)  
Certainly there was evidence of Smith's adverse possession, and it was error for the court not to let it go to the jury. (*Curtis v. Louisville City R'y Co.*, MS. Op. Superior Court, Oct. 5, 1892.)
6. The court should have instructed the jury to find for Stembridge as to all the land in his possession at the date of the judgment in the former case, independently of any other question. (*Troutman v. Vernon*, 1 Bush, 484; *Talbott v. Todd*, 5 Dana, 198; 2 Bibb, 589; 3 Bibb, 389; 1 Mar., 526; 2 Mar., 354; 2 Mar., 527; 3 Mar., 435; 7 B. M., 400; 11 B. M., 362; 9 Bush, 166.)
7. The court should have instructed the jury that unless the plaintiffs who sue jointly for the recovery of the land as a whole are the *only* heirs of Mary Hillyer, they could not recover. (8 J. J. Mar., 93; 3 Litt., 40; 7 Dana, 177; 4 B. M., 213; 12 B. M., 354.)
8. The verdict is contrary to the law and the evidence.

S. B. & R. D. VANCE OF COUNSEL ON SAME SIDE.

## MONTGOMERY MERRITT FOR APPELLEES.

1. Although the appointment of commissioners to divide the lands of Richard Henderson & Co. was irregular, yet the heirs having taken possession of the land under that division and conveyed same, the division cannot now be questioned. All parties are estopped. (5 Mon., 450; *Dembitz's Ky. Jurisprudence*, 234.)
2. The plaintiffs had a common interest and there was no reason for requiring them to elect. (*Newman's Pleading and Practice*, p. 123.)
3. The plea of *res judicata* was not sustained. The boundary of the land plaintiffs are claiming in this suit does not embrace the 127 acres claimed by Stembridge in the former action.

Estoppels are not good by implication, but must be certain as to Vol. 94—40.

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every intent. The subject matter of the two suits must be the same. The issues must be the same. (Herman on Estoppel, sec. 102.)

4. Smith and Stembridge both rely upon adverse possession for more than fifteen years. Upon that plea the weight of evidence and the verdict of the jury are against them.

**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

This action was originally instituted in equity by the heirs of Mary Hillyer for a division of the land descending to them from and through her.

The firm of Henderson & Co., of which one David Hart was a member, obtained from the State of Virginia a large grant of land, that in the year 1797 was divided between them, and the heirs of David Hart obtained their interest in the allotment. In the year 1811 that part of the grant allotted to Hart's heirs was divided between them, and deeds made by the commissioner making the partition. Mary Hillyer, being one of the heirs, obtained her deed (made to husband and wife), and it is this land the present appellees are seeking to have divided in the present action. They had made previous attempts to have the land divided, but by reason of some irregularities, the partition was not sanctioned or approved by the heirs. When the division of the land was made in the year 1797 between the original patentees, they all took actual possession except Hillyer and wife, and have sold their respective interests until divested of title.

The appellants Stembridge and Smith, being in possession of a part of the land, were made defendants to this action, and set up an adversary claim based alone, as this record shows, on an adverse possession. On their motion the case was transferred to the ordinary docket, that the issue of title might be tried, and resulted in a judgment for the plaintiffs.

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It is claimed that the original deeds of partition made to the patentees is invalid, because the statute under which the division was made required that six commissioners should be appointed instead of two, and, therefore, no title passed. It is plain that these parties entered on their respective parcels, and have disposed of them, except Hillyer and wife, and a division made nearly a century ago should be sustained, and as evidencing such a title as to enable the partitioner to maintain his ejectment for an entry upon his allotment. The court will not inquire whether these deeds of partition were executed by two or six commissioners after such a lapse of time as against those who enter and claim only by an adverse possession.

The appellants were in possession of this land claimed by the appellees, and it was not necessary that separate actions should be instituted in order to a recovery, or that the plaintiffs should be held bound to a division that all repudiated by seeking another partition.

This was an issue out of chancery sought by the defendants for the purpose of passing on the title, and as title is shown in the plaintiffs and none in the defendants, the verdict and judgment was proper. Neither of the defendants pretend to have any paper title to the Hillyer land, and the lines and corners of the Hillyer tract being established by the weight of the testimony and embracing the land sued for, we see no reason for reversing this case. The deed from Gayle, Smith's evidence of title, covers no part of the land in dispute, and it is unreasonable to sup-

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pose that Smith, as one of the commissioners, when attempting to divide these lands between Hillyer's heirs in 1875, allotted in fact to them land which he claims now to have owned and been in the actual possession of at that date.

As to Stembridge, he never claimed but 127 acres of the land to which title was asserted by Hillyer's heirs, and this he recovered or was adjudged to be the owner of in a former litigation between Hillyer's heirs and himself.

He obtained all he then claimed, and has no title to any of the land in dispute by reason of the former litigation, and the title asserted by adverse possession he failed to sustain, as was adjudged by the verdict and judgment below.

It is apparent from the record that these appellants have attempted to acquire title by actual possession, and whether that possession ripened into a title before this action was instituted, was one for the jury. We perceive no error of which the appellants can complain, and the title having been established, all the court is now required to do is to order a division between the heirs as asked for in the original action.

Judgment affirmed.

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To a petition for rehearing, filed by counsel for appellants, Judge PRYOR delivered the following response of the court:

It is manifest that neither of the appellants has title to the land in controversy, and whether regarded as an action for the division of land between the heirs of Hillyer or an ejectment against the appel-

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lants, the appellees were entitled to recover. The original action was in equity, and evidently intended as one for a division; but it is conceded that as against appellants, who claimed to be in the possession, it was an ejectment. In the former judgment, in an action between these parties and Stembridge, the latter only claimed one hundred and twenty-seven acres of the land claimed by the Hillyers, and this he obtained, and it is now an undisputed fact that no part of this one hundred and twenty-seven acres is claimed by the appellees, and the amended petition filed in that action, and the answer thereto, puts in issue the title to the land in Arterburg's possession, who was a tenant of Stembridge. That proceeding, when considered with reference to the issue made in the original action, sustains the claim of the appellees as against Stembridge, as it is evident he disclaimed to own any part of the land except the one hundred and twenty-seven acres, and the appellant Smith is now claiming to own land that was allotted the appellees by him as a commissioner appointed for that purpose. Neither is entitled to have the possession. This land was allotted to James Hillyer and wife, nor is it disputed that these appellees are the heirs of James and Mary Hillyer, and the conveyance was made to the latter by commissioners in the year 1811. They have the title, and are entitled to recover.

Petition overruled.

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1. Mere non-user is not an abandonment of an easement created by deed; but if there is an actual adverse user by the owner of the servient estate for fifteen years, the easement is extinguished. *Lou. & Nash. R. Co. v. Quinn, &c.* . . . . . 310
2. An easement may be acquired and perfected by prescription so as to pass by descent to heirs at law; and whether acquired by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of fifteen years by even a tort-feasor. *Hook, &c. v. Joyce*. . . . . 450
3. Burial of the dead body in a cemetery lot is the only possession, when claimed and known, necessary to ultimately create complete owner-

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Adverse Possession. Allegation and Proof.

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**ADVERSE POSSESSION—Continued.**

- ship of the easement so as to render it inheritable; and as long as gravestones stand, marking the place as burial-ground, the possession is actual, adverse and notorious. Nor can there be an actual adverse possession by an intruder, nor running of the statute of limitations in his favor, while such gravestones stand there indicating by inscription the previous burial of another. *Idem* . . . 450
4. Where there are conflicting patents for land, and the junior patentee enters upon and holds the actual possession of a part of the interference, claiming the interference to the extent of his patent boundary, the senior patentee not being in the actual possession of his land at the time of such entry and occupancy, the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside the interference does not give him the actual or constructive possession of any part of the interference, nor does his entry upon and occupancy of the interference give him the possession of it except to the extent of his inclosure. *Whitley County Land Co. v. Lawson* . . . . . 603
5. Where a conveyance covers several pieces of land that are distant from each other, the possession of one in the name of the whole does not give the owner actual possession of the whole. *Idem* . . . . . 603
6. Whether the possession of defendants had ripened into a perfect title was a question for the jury, this being an issue out of chancery to try the question of title. *Smith, &c., v. Normont, &c.* . . . . 624

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**AIDERS AND ABETTORS—**

Aiders and abettors may be punished as principals under a statute creating a felony, unless it is plain from the nature of the offense that the intent of the statute is to inflict punishment only on the person actually committing the offense.

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2. An appeal lies to the circuit court from an order of the county court refusing to probate a will whether for supposed want of jurisdiction or for other cause, the refusal to probate being a "rejection" of the will within the meaning of the statute giving an appeal. And upon the trial of the appeal in the circuit court, if that court determines that the county court has jurisdiction, it should hear the case upon its merits, and determine whether the will should have been probated, although the county court may have refused to probate the will upon the sole ground that it had no jurisdiction. *Preston, &c. v. Fidelity Trust and Safety Vault Co.* . . . 295
3. The Court of Appeals refuses to grant a writ of prohibition to prevent the circuit court from entertaining jurisdiction of a case, holding that the circuit court has jurisdiction; but the court does not decide the question as to its power to issue the writ if there had been no jurisdiction in the court below. *Mengle Jr. Bro. Co. v. Jackson, Judge* . . . . . 472
4. An appeal lies from a judgment dissolving an injunction where it is rendered on final hearing, and as part of a judgment dismissing the petition. *Pendergest, &c. v. Heekin, &c.* . . . . . 884
5. Supersedes of final order dissolving injunction leaves the injunction in full force, and defendant is guilty of contempt if he disregards it. *Elizabethtown, &c., R. Co. v. Ashland, &c., St. R'y Co.* . . . 478
6. As a judgment dismissing plaintiff's petition and dissolving his injunction disposed of all the issues in the case, it was final, although a counter-claim filed by defendant was not in terms disposed of. *Idem* . . . . . 478
7. When on final hearing an injunction is dissolved, the right to apply for reinstatement does not exist, although time be given for that purpose. The only remedy is by appeal. *Idem* . . . . . 478
8. In criminal cases decisions of the court upon challenges to the panel and for cause are not subject to exception. *Roberts v. Commonwealth* . . . . . 499

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 Appeals. Assignments by Operation of Law.
 

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**APPEALS—Continued.**

9. The mandate of this court, in a criminal case, may issue immediately upon the decision of the appeal, as the provision of the Civil Code that no mandate shall issue, nor decision become final, until after thirty days from the day on which the decision is rendered, applies to civil cases alone. *Nelson v Commonwealth*. . . . . 594

**APPEARANCE—**

The defendant to a cross-petition, having combated the claim set up in that pleading by filing exceptions to the commissioner's report, can not now object to the judgment upon the ground that she was not summoned on the cross-petition, as she is to be regarded as having entered her appearance. *Newman v. Moore* . . . . . 147

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**ASSAULT—**

1. Under an indictment for an "assault with intent to rob" the court should, if the evidence authorizes it, instruct the jury as to the offense of a common assault and battery. *Barnard v. Commonwealth* . . . . . 285
2. To constitute an assault and battery within the meaning of section 1 of chapter 10 of General Statutes, which provides that actions for assault and battery shall die with the person, the act complained of must be done with a hostile intent. Mere acts of negligence do not constitute an assault and battery within the meaning of the statute, even when trespass would lie. *Perkins v. Stein & Co.* . . . . 433

**ASSIGNMENT—**

1. The assignee of a note executed by a married woman for the price of land purchased by her may, although the obligor has repudiated her contract, subject the land to pay what he paid for the notes, but not for their full face value, unless he paid that for them. *Newman v. Moore* . . . . . 147
2. A contract whereby a note was assigned to an attorney in consideration of his agreement to bring suit on the note at his own cost and divide with the assignor whatever sum he might collect was champertous and void. *Roberts v. Yancey, &c.* . . . . . 243

**ASSIGNMENTS BY OPERATION OF LAW—**

As to duty of assignee for creditors where there have been unlawful preferences prior to assignment—See **ASSIGNMENTS FOR CREDITORS**.

1. A petition filed by one creditor seeking to have an act of the debtor declared to operate as an assignment under the statute, inures to

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Assignments by Operation of Law. Assignments for Creditors.

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**ASSIGNMENTS BY OPERATION OF LAW—Continued.**

- the benefit of all, and any creditor has the right to proceed under it. Therefore, although the petition in this case was dismissed by the creditors who filed it, yet creditors who had been made plaintiffs with them by an amended petition, had the right to prosecute the action, and it is not material whether process on the amended petition was served on the defendants. *Baker, &c., v. Kinnaird* . 5
2. Where the indebtedness of a merchant amounted to three times as much as his assets, and his creditors were making a race of vigilance in obtaining securities for their respective claims, one mortgage after another being executed by the debtor, the design to prefer is manifest, and the several transfers must be declared to operate as an assignment under the statute. *Idem* . . . . . 5
  3. A mortgage executed by the debtor to indemnify one who became his surety in the renewal of a note in bank which was overdue, it being recited in the mortgage that it was to inure to the benefit of the bank, must be regarded as a device to prefer the bank, the note being subsequently renewed by the surety in his own name, and the mortgage assigned by him to the bank without any recollection upon his part that he had done so. *Idem* . . . . . 5
  4. Money that has been paid to preferred creditors on their collaterals must be refunded by them, or credited on their claims if the amount does not exceed the sum to which the creditor collecting it is entitled in the distribution of the debtor's estate. They can not be regarded as bona fide purchasers. *Idem* . . . . . 5
  5. A preferred creditor to whom the debtor's homestead has been transferred with other property may retain the homestead, the debtor having the right to dispose of that as he pleased. *Idem* . . . . . 5
  6. In an action to set aside a conveyance as fraudulent as to creditors, it is error to the prejudice of the debtor, in the absence of any pleading bringing the case within the statute against fraudulent preferences, to adjudge that there has been an assignment by operation of law of all the debtor's estate for the benefit of his creditors. *Stamper, &c., v. Hibbs, &c.* . . . . . 358
  7. A mortgage executed by an insolvent debtor to an antecedent creditor with the design to prefer, operates as an assignment under the statute, although executed pursuant to a promise made at the time the debt was created. *Darnell & Son, &c., v. Lewis* . . . . . 455

**ASSIGNMENTS FOR CREDITORS—**

As to involuntary assignments—See **ASSIGNMENTS BY OPERATION OF LAW.**

Even if an assignee for the benefit of creditors could not have maintained an independent action to have certain mortgages executed by the debtor prior to the assignment declared to operate as an assignment under the statute, yet as the mortgagees were attempt-

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 Assignments for Creditors. Bills and Notes.
 

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**ASSIGNMENTS FOR CREDITORS—Continued.**

ing to enforce their mortgages while unsecured creditors were attacking the mortgages as preferences under the statute, it was the duty of the assignee to have the question determined. *Baker, &c., v. Kinnaird* . . . . . 5

**ATTORNEYS—**

As to right to concluding argument to jury—See **BURDEN OF PROOF**, 2.

1. A contract whereby a note was assigned to an attorney in consideration of his agreement to bring suit on the note at his own cost and divide with the assignor whatever sum he might collect was champertous and void. *Roberts v. Yancey, &c.* . . . . . 248
2. The court did not abuse its discretion in limiting the time of counsel in their argument to twenty-five minutes, there being comparatively little conflict of testimony and the instructions being unusually simple and direct. *L. & N. R. Co. v. Earl's Adm'r* . . . . . 468
3. A verdict will not be set aside on account of misconduct of attorneys in argument to jury where it is apparent no other verdict could have been rendered. *Hourigan v. Commonwealth* . . . . . 520

**BANKS—**

As to forfeiture of interest by National banks by charging usury—See **USURY**.

- A bank in which a tax collector had on deposit the taxes collected by him had the right, with his consent, to apply the money to the payment of a debt he owed the bank, and the sureties in his bond who have been compelled to answer for his default can not require the bank to account to them for the money. *Lee, &c., v. Marion National Bank* . . . . . 41

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2. A contract whereby a note was assigned to an attorney in consideration

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**BILLS AND NOTES—Continued.**

- of his agreement to bring suit on the note at his own cost, and divide with the assignor whatever sum he might collect, was champertous and void. *Roberts v. Yancey, &c.* . . . . . 243
3. Where the name of one of several members of a firm is signed to a note, the firm may be held liable on the note upon parol proof that all the members of the firm assented to the signing of the note in this way in order to raise money for the firm, and that credit was given to the firm. *Carter v. Mitchell, Assignee, &c.* . . . . . 261

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**BONDS—**

- As to necessity for execution of bond by guardian or committee in action for sale of real estate—See **LIFE ESTATES, 1.**
1. Where a surety in the bond of a personal representative procures the execution of a new bond, containing a stipulation indemnifying him against "any loss, cost or damage legally incurred by reason of said suretyship," if judgment is obtained against him upon the old bond, and he in good faith prosecutes an appeal from the judgment, the indemnitor is liable to him for the legal or court costs incurred upon the appeal, and also the damages upon affirmance of the judgment. But unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, the extraordinary costs of the appeal, such as attorneys' fees, are not chargeable to him. *Brandt's Ex'r v. Donnelly* . . . . . 129
2. In an action against the indemnitor upon the bond executed by him, it is no defense that the principal appeared and executed the bond without notice having been served on him. *Idem.* . . . . . 129

**BURDEN OF PROOF—**

As to burden of proof in action for recovery of land—See **EJECTMENT, 1.**

Burden on husband of rebutting presumption of fraud in antenuptial contract—See **HUSBAND AND WIFE, 8.**

1. Where the defendant in an action to recover damages for personal injuries relied for defense upon a writing signed by the plaintiff acknowledging the receipt of a certain sum from the defendant

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 Burden of Proof. Cemeteries.
 

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**BURDEN OF PROOF—Continued.**

- "in full settlement" of all claims against defendant on account of the injuries received, it was error to instruct the jury that the burden was on the defendant to show that the plaintiff fully understood and assented to the agreement as a settlement of his claim for damages. The presumption is conclusive that the plaintiff so understood the writing, and he is bound by it with that meaning unless he attacks it by a plea of mistake, and then sustains that plea by the weight of evidence. *The Addyston Pipe and Steel Co. v. Copple*. . . . . 292
2. In an action upon an accident insurance policy, the defendant having attempted to deny that death was caused by the accident as alleged in the petition, the burden was on the plaintiff, and she was entitled to the concluding argument to the jury, and the defendant will not now be allowed to say that its denial was bad, and that as the only defense was that the insured was intoxicated, it was entitled to the burden of proof. *American Accident Co. v. Reigart*. . . . . 547

**BURIAL—**

As to adverse possession of easement of burial—See **ADVERSE POSSESSION**, 3.

**CARRIERS—**

As to liability of passenger carriers—See **RAILROADS**, 14, 15, 20; **STREET RAILWAYS**, 1, 2, 3.

1. Where a contract for the shipment of horses owned by different persons was made with the carrier by one person acting as the agent of the several owners, each owner had a separate right of action for the damages suffered by him by breach of the contract, and if all had united in one action the defendant would have had cause of demurrer. Therefore, defendant had no right, after separate actions were brought, to demand that they be consolidated. *Baughman, &c., v. Louisville, &c., R. Co.* . . . . . 150
2. A common carrier can not contract for exemption from the consequences of his own negligence or that of his servants; nor will the courts give effect to a stipulation in a contract for the shipment of goods exempting the carrier from paying their full value in the event they are lost or destroyed by his negligence, although the stipulation be in the form of an agreement as to the value of the goods. *Idem*. . . . . 150

**CASES OVERRULED—**

*Stamper v. Commonwealth*, 7 Bush, 612 . . . . . 527

**CEMETERIES—**

As to adverse possession of cemetery lot—See **ADVERSE POSSESSION**, 3.

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 Champerty. Codes of Practice.
 

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**CHAMPERTY—**

1. A contract whereby a note was assigned to an attorney in consideration of his agreement to bring suit on the note at his own cost, and divide with the assignor whatever sum he might collect, was champertous and void. *Roberts v. Yancey, &c.* . . . . . 248
2. To constitute a champertous contract under the statute it is not necessary that an action should be pending. *Idem.* . . . . . 248

**CHANGE OF VENUE—**

1. Upon an application for a change of venue in a criminal case, the filing by the defendant of the required petition and affidavits makes for him a *prima facie* case, and if no witnesses are introduced by either party, he is entitled to a removal of the cause. The court has then no discretion. *Higgins v. Commonwealth.* . . . . . 54
2. Where a criminal case in which there has been a change of venue is, upon motion of defendant, remanded to the court of original jurisdiction, he can not, after being tried and convicted in that court, complain that it had no jurisdiction. *Hourigan v. Commonwealth.* . . . . . 520
3. Where the defendant has obtained a change of venue without observing the formalities provided by the statute, the Commonwealth consenting, he can not, after being tried in the forum thus selected by him, question its jurisdiction. *Idem.* . . . . . 520
4. The provision of the statute requiring that the record of a case, the venue of which has been changed, shall be filed in the court to which it is removed ten days before the first day of the next term of court, in order that it may stand for trial at that term, does not apply to criminal cases. *Idem.* . . . . . 520

**CIRCUIT COURTS—**

As to calling of special terms—See **COURTS.**

**CIRCUIT JUDGES—**

As to election of—See **ELECTIONS, 3.**

**CIRCUITY OF ACTION—See SPECIFIC PERFORMANCE.****CODES OF PRACTICE—**

The provision of the Civil Code that no decision of the Court of Appeals shall become final until the expiration of thirty days does not apply to criminal cases. *Nelson v. Commonwealth.* . . . . . 594  
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## COLLECTORS—See TAX COLLECTORS.

## COMMITTEE—

As to necessity for execution of bond by committee in action for sale of real estate. See LIFE ESTATES, 1.

## COMMON SCHOOLS—

1. Mandamus does not lie to compel a county judge to issue a writ of *ad quod damnum* for the purpose of condemning land on which to build a school-house. Wright, &c., v. Baker . . . . . 348
2. The trustees of a common school district are created a body-politic, and when they sue as such a body the withdrawal by some of the trustees of their names as plaintiffs does not affect the proceeding. *Idem.* . . . . . 848

## COMPROMISE—

Of claim for damages on account of personal injuries. See BURDEN OF PROOF, 1.

## CONDEMNATION—See EMINENT DOMAIN.

## CONFIDENTIAL COMMUNICATIONS—

As to competency of letter from husband to wife as evidence against husband—See EVIDENCE, 17.



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Consolidated Actions. Constitutional Law.

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**CONSOLIDATED ACTIONS—**

As to right to demand consolidation—See **JOINDER OF ACTIONS**, 1.

Where the plaintiffs in one of two consolidated actions were defendants in the other, they are to be regarded as before the court in the latter action, although there was no service of process on them in that case. *Baker, &c., v. Kinnaird* . . . . . 51

**CONSTITUTIONAL LAW—**

As to validity of Act of Legislature extending limits of town. See **TAXATION**, 6, 7.

As to particular sections of Kentucky Constitution cited, construed, &c.—See **CONSTITUTION OF KENTUCKY**.

1. An act, entitled "An act to regulate the sale of fertilizers in this Commonwealth, and to protect the agriculturist in the purchase and use of the same," (Gen. Stats., chapter 42a, 650), relates to but one subject, and that is expressed in the title. *Vanmeter v. Spurrier, &c.* . . . . . 22
2. The Legislature has power to authorize the county court to close or discontinue public roads without making compensation to the owners of abutting property, although no such power exists as to the streets of a town or city. *Bradburry v. Walton, &c.* . . . 163
3. As the provision of the Constitution directing the election of circuit judges to be held on the first Tuesday after the first Monday in 1892 was imperative, it was not necessary that there should be an emergency clause to the act of the Legislature regulating the election. *Hall v. Commonwealth* . . . . . 322
4. Section 157 of the present Constitution, limiting the tax rate of towns and cities, is not self-operative, and until the towns and cities are classified by the Legislature their existing charters continue in force including their tax rates and methods of raising revenue. *Holzhauser v. City of Newport* . . . . . 396
5. While section 158 of the present Constitution, limiting the indebtedness of towns and cities, does not require legislation to make it operative, yet by the express terms of this section the limitation of ten per centum provided for therein as to certain classes of cities may be exceeded when the proposed indebtedness was authorized under laws in force prior to the adoption of the present Constitution; and there is no limit to this excess; and, however great the amount of the existing and authorized liabilities of any town or city at the time of the adoption of the Constitution, there may be an increase of indebtedness beyond that amount to the extent of two per centum upon the value of the taxable property therein. *Idem* . . . . . 396
6. Section 159 of the present Constitution, which provides that whenever any county, city, etc., "is authorized to contract an indebtedness

## Constitutional Law. Continuance.

## CONSTITUTIONAL LAW—Continued.

- it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest," etc., requires legislation to make it operative. *Idem* . . . . . 396
7. Sections 171 and 174 of the Constitution which require uniformity of taxation according to value, announce nothing new, but are merely declaratory of what was always the law of taxation in this State, and, therefore, do not forbid local assessments to pay for the improvement of streets or the construction of sewers. *Idem* . . . 396
8. While a civil action can not be instituted in or transferred to the criminal branch of the Jefferson Circuit Court, the judge thereof may be empowered by statute, as has been done, to hear and determine, according to prescribed rules, a case pending in any other branch when the ends of justice require it. *Mengel Jr. Bro. Co. v. Jackson*, Judge . . . . . 472

## CONSTITUTION OF KENTUCKY—

Provisions cited, construed, &amp;c.

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Section 159 . . . . .	406
Section 166 . . . . .	402
Section 171 . . . . .	407
Section 174 . . . . .	407

## CONTEMPT—

1. Supersedes of a final order dissolving an injunction leaves the injunction in full force, and defendant is guilty of contempt if he disregards it. *Elizabethtown, &c., R. Co. v. Ashland, &c., St. R. Co.* . . . . . 478
2. A street railway company having constructed its road across a railroad track at a point where it had been enjoined from constructing its road is in contempt, and the only process of purging the contempt is to remove the obnoxious track. *Idem* . . . . . 478

## CONTINUANCE—

1. Upon the trial of appellant for murder, he was entitled to a continuance on account of the absence of a witness, who, if present, would have testified that the deceased, just before the killing, advanced rapidly toward defendant with an angry look, having his hand in his pocket, and when he came up threatened to kill defendant, the affidavit for a continuance showing that due diligence had been used to procure the attendance of the witness. And in view of the Vol. 94—41.

## Continuance. Contracts.

**CONTINUANCE—Continued.**

- conflict in the testimony as to what took place immediately preceding the killing, the error in refusing a continuance was prejudicial. *Bowlin v. Commonwealth* . . . . . 391
2. Defendant was also entitled to a continuance on account of the absence of witnesses whose attendance he had used due diligence to procure, and who, if present, would have testified that deceased had offered to hire one of them to kill defendant, and also that deceased had purchased a rifle for the purpose, as stated by him, of killing defendant. *Idem.* . . . . . 391
3. The defendant was not prejudiced by the refusal of the court to grant a continuance, asked because of the absence of a witness, who, if present, would have sworn that defendant was of unsound mind, there being other witnesses present who did so testify, and the affidavit for a continuance, so far as competent, being read to the jury as evidence. *Roberts v. Commonwealth.* . . . . . 499
4. The court did not abuse its discretion in refusing a continuance because of the absence of witnesses, on account of whose absence continuances had repeatedly been granted, there being nothing to show that by a continuance their presence could be had at the next term, and the affidavit for a continuance being read as their deposition. *Hourigan v. Commonwealth* . . . . . 520
5. The court did not err in refusing a continuance on account of the absence of witnesses, as the trial was had four years after the indictment was found, and the affidavit disclosing what the absent witnesses would testify was read as a deposition. *Johnson v. Commonwealth* . . . . . 578

**CONTRACTORS—**

As to right of street contractors to recover part of price of work which has been retained by city to secure performance of agreement to keep street in repair—See **CONTRACTS**, 9.

**CONTRACTS—**

As to separate right of action on contract for shipment of horses owned by different persons—See **CARRIERS**.

As to contracts for sale of land—See **VENDOR AND VENDEE**.

As to insurance contracts—See **INSURANCE**.

As to champertous contracts—See **CHAMPERTY**.

Contract set aside for fraud—See **FRAUD**, 3.

As to contract made by subscription to railroad corporation to induce location of shops—See **CORPORATIONS**, 5, 6.

Fraud in ante-nuptial contract presumed—See **HUSBAND AND WIFE**, 3.

1. A contract prohibited by statute will not be enforced, and it is not necessary that there should be an express prohibition in order to render

## Contracts.

## CONTRACTS—Continued.

the contract void; as a general rule the fact that a penalty is attached implies a prohibition.

A contract for the sale of a fertilizer not labeled as required by the statute is void, although such a sale is not expressly prohibited. *Vanmeter v. Spurrier, &c.* . . . . . 22

2. A common carrier can not contract for exemption from the consequences of his own negligence or that of his servants; nor will the courts give effect to a stipulation in a contract for the shipment of goods exempting the carrier from paying their full value in the event they are lost or destroyed by his negligence, although the stipulation be in the form of an agreement as to the value of the goods. *Baughman, &c., v. Louisville, &c., R. Co.* . . . . . 150
3. If an act in violation of law be already committed, a subsequent agreement founded thereon is valid, provided it constituted no part of the original inducement or consideration of the illegal act. *Martin v. Richardson* . . . . . 183
4. Where one by fraudulent representations obtains possession of a lottery ticket which has drawn a prize, and receives the money thereon, he is to be regarded as collecting the money for the use of the rightful owner of the ticket, who may maintain an action therefor, although he originally purchased the ticket from the defendant in violation of law, and parted with it to defendant in exchange for another lottery ticket, the exchange being induced by defendant's fraud. *Idem.* . . . . . 183
5. In all such cases every presumption is in favor of the legality of the transaction, and even if the fact that the lottery ticket was purchased in Kentucky, and therefore in violation of law, would prevent a recovery, it must be presumed, in the absence of proof to the contrary, that the ticket was not purchased or exchanged in Kentucky, but in some place where it was lawful to purchase or exchange it. *Idem.* . . . . . 183
6. As the defendant denied by his answer that the plaintiff had ever owned or held the ticket which the plaintiff alleged in his petition defendant had obtained from him by fraud, certain transactions set up by defendant in his answer as to the sale by him to plaintiff of lottery tickets and their subsequent exchange, which transactions he alleges occurred in Kentucky, necessarily excluded the transaction with reference to the particular ticket in question here, and therefore it does not appear from the pleadings, which are alone presented for review, that this ticket was purchased or exchanged in Kentucky, it not being so alleged in the petition. *Idem.* . . . 183
7. A verbal contract to issue a policy of fire insurance is valid and enforceable, and if the insured property is destroyed by fire before the issual of the policy under the contract, a court of equity hav-

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Contracts. Contributory Negligence.

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## CONTRACTS—Continued.

- ing jurisdiction to decree specific performance will, to avoid circuitry, adjudge damages just as if the policy had been issued and an action had been brought on it for the loss of the thing insured. *Howard Ins. Co v. Owen's Adm'r* . . . . . 197
8. An agreement by one person to make another his heir is not enforceable, and no action lies for its breach. The statute points out the only way in which one person can make another his heir. *Davis, &c., v. Jones' Adm'r* . . . . . 320
9. Where a contractor undertook by contract with a city to construct an asphalt pavement, and to keep it in repair for a term of five years from the completion of the work, the city to retain ten per cent. of the cost as security for the performance of the contract to keep the street in repair, in an action brought at the end of the five years by persons who had succeeded by purchase to the right of the original contractor, seeking to recover of the city the ten per cent. retained, it was essential to the plaintiffs' cause of action that they should allege that the street was kept in repair as covenanted by the original contractor. It was not sufficient for them to allege that they were without knowledge or information sufficient to form a belief as to that matter, or that it was either kept in repair or was not kept in repair, and that they did not know which was true. *City of Louisville v. Muldoon, &c.* . . . . . 462
10. A company which covenanted with plaintiffs to keep the street in repair was improperly joined as a defendant, there being no contract between that company and the city. *Idem.* . . . . . 462

## CONTRIBUTIONS—

As to distribution of money contributed for sufferers by storm—  
See TRUSTS, 4.

## CONTRIBUTORY NEGLIGENCE—

As to contributory negligence of railroad brakeman in failing to comply with agreement to use coupling stick—See RAILROADS, 10.

1. A land-owner's erection and use of a building for ordinary purposes near a railroad track, although it is more exposed to fire than if it were at a greater distance, is not negligence and will not deprive him of a right of action against the railroad company for the loss of the building by fire resulting from sparks escaping from a locomotive through the company's negligence. *Cincinnati, &c., R. Co. v. Barker, &c.* . . . . . 71
2. Attempting to cross a railroad track without looking the one way or the other, may or may not be contributory negligence according to the circumstances; and if the facts are such that men might differ as to whether the person injured, notwithstanding his failure

## Contributory Negligence. Corporations.

## CONTRIBUTORY NEGLIGENCE—Continued.

- to look along the track, exercised that degree of care that prudent persons would ordinarily exercise under the circumstances, the question of contributory negligence is for the jury. *Wright v. Cincinnati, &c., R. Co.* . . . . . 114
3. The plea of contributory negligence was not inconsistent with the denial of the negligence alleged in the petition, and the defendant had the right to rely upon both defenses. *Idem* . . . . . 114
4. A railroad brakeman who, while riding on the ladder on the side of a car, was crushed between the moving car and a car standing on another track, was not guilty of contributory negligence in riding on the ladder of the car. *L. & N. R. Co. v. Earl's Adm'x.* . . . 368
5. Although the plaintiff's intestate was guilty of contributory negligence, the defendant is liable if the fireman in charge of the engine could, by *reasonable diligence*, have discovered his danger in time to avert the injury. To authorize a recovery, it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him. *Idem* . . . . . 368
6. A passenger was not guilty of contributory negligence in entering the passenger car of a mixed freight and passenger train without notifying the conductor, although the car was fifty feet from the platform, the rules of the company requiring persons taking passage on such trains to get on from the road-bed, or wherever the convenience of those in charge of the train required, and such being the custom of passengers. Nor does the fact that the passengers other than plaintiff were warned of the danger, and succeeded in getting out of the car before a collision with an approaching train, show that plaintiff was guilty of contributory negligence in not doing so. *L. & N. R. Co. v. Long* . . . . . 410

## CORONER—

As to time of holding election to fill vacancy in office of—  
See ELECTIONS, 1.

## CORPORATIONS—

1. While one person can not organize a corporation under chapter 56 of the General Statutes, yet when a corporation has been created under that statute, with the stock distributed among several stockholders, the purchase by one of them in good faith of all the stock does not destroy the existence of the corporation, but merely suspends its franchise until the stock may be transferred to others; and while, in the meantime, the corporate property is liable for the individual debts of the sole owner, and subsequent purchasers of stock take it subject to the liens or equities of his creditors created prior to the transfer of the stock to them, yet the individual property of the sole owner is not liable for debts created by him on

## Corporations. Costs.

## CORPORATIONS—Continued.

- behalf of and in the name of the corporation. The parties contracting with him as a corporation get all they bargained for when they subject the corporate property to the payment of their debts. *Louisville Banking Co. v. Eisenman, &c.* . . . . . 83
2. In corporations other than such as are created under chapter 56 of the General Statutes, the purchase by one stockholder of all the stock does not dissolve the corporation. *Idem* . . . . . 83
3. In the absence of a fraudulent purpose, the failure of the stockholders in a corporation created under the statute to pay in all the stock required to be paid in before beginning business does not render them liable under that provision of the statute giving a right of action against the members of the corporation in favor of any person who has been injured through their "intentional fraud" in failing to comply substantially with the articles of incorporation. *Idem* . . . . . 83
4. The claim of the corporation against a stockholder for stock subscribed and not paid in forms a part of the assets of the corporation, and may be subjected by its creditors. *Idem* . . . . . 83
5. Where one corporation purchases under legislative authority the property and franchises of another, it holds the property free from the claims of creditors of the vendor as if it had been an individual transaction. *Board of Trustees of Elizabethtown v. Chesapeake, &c., R. Co.* . . . . . 377
6. Where a town made a subscription to the capital stock of a railroad corporation in consideration of the company building its machine-shops in the town, a subsequent purchaser of the property and franchises of the corporation did not become bound to continue the machine-shops in the town, and having removed them the town has no cause of action against it therefor. And even if the town had a lien upon the property of the original corporation to secure performance of its contract, it waived its lien by allowing the property to be sold under judgment of court without asserting its lien. *Idem* . . . . . 377
7. The failure of the purchaser to comply with a provision of its charter requiring it to continue certain trains run by the vendor does not give a right of action to the town for damages on that account. For a violation of that statute the Commonwealth alone can maintain an action. *Idem* . . . . . 377

## COSTS—

Where a surety in the bond of a personal representative procures the execution of a new bond containing a stipulation indemnifying him against "any loss, cost or damage legally incurred by reason of said suretyship," the surety in the new bond is liable for the legal or court costs incurred by the surety in the old bond in prose-

## Costs. Courts.

**COSTS—Continued.**

cuting in good faith an appeal from a judgment obtained against him upon the old bond; and the extraordinary costs of the appeal, such as attorneys' fees, are also chargeable to him if he encouraged or directed the appeal, or it appeared palpably to be to his advantage. *Brandt's Ex'or v. Donnelly*. . . . . 129

**COUNTER-CLAIM AND SET-OFF—**

1. In an action to recover the purchase price of a fertilizer, the plaintiff not being entitled to recover because he sold the fertilizer without attaching the label required by the statute, the defendant was not entitled to recover anything on his counter-claim as he was not damaged by the failure of plaintiff to comply with the statute. *Vanmeter v. Spurrier, &c.* . . . . . 22
2. In an action to settle a partnership in the business of operating a mill, the defendants had the right to plead as a counter-claim their cause of action against plaintiffs for breach of warranty in the sale to them of one-third the mill. *Garner, &c., v. Jones, &c.* . . . . 135
3. Unliquidated damages can not be pleaded as a set-off unless the plaintiff is non-resident or insolvent. It is not sufficient to authorize such a set-off that one of several plaintiffs is a non-resident, there being nothing to show that the other plaintiffs are either non-resident or insolvent. *Idem.* . . . . . 135
4. As a judgment dismissing plaintiff's petition and dissolving his injunction disposed of all the issues in the case it was final, although a counter-claim filed by defendant was not in terms disposed of. *Elizabethtown, &c., R. Co. v. Ashland, &c., St. Ry. Co.* . . . . 473

**COUPLING-STICK—**

As to contributory negligence of railroad brakeman in failing to comply with agreement to use coupling-stick—See **RAILROADS**, 10.

**COURT OF APPEALS—**

As to practice in—See **APPEALS**.

**COURTS—**

As to questions for—See **QUESTIONS FOR COURT AND JURY**.

As to jurisdiction of criminal branch of Jefferson Circuit Court—See **JURISDICTION**.

Under the present law controlling the calling of special terms of circuit courts, the order for a special term in counties where the circuit court has not a continuous session must, although made at the close of or during the regular term, specify the day when the special term is to begin, and also give the style of each case to be tried, or in which motions or orders are to be made. And this must also be done where the special term is called by a notice posted as the statute requires. But as that law is not retroactive in its effect, it



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 Courts. Cyclone.
 

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**COURTS—Continued.**

does not apply to this case, as the order for the special term at which appellant was tried was made at the April term, 1893, of the Lee Circuit Court, and the act reorganizing the circuit courts, which contains the provisions as to special terms, was approved and went into effect June 10, 1893. *Toler v. Commonwealth* . . . 529

**COVENANTS FOR TITLE—**

As to breach of—See **WARRANTY**.

**CRIMINAL LAW—**

For particular offenses—See **DISORDERLY HOUSE; FALSE SWEARING; FORGERY; HOMICIDE; INDICTMENT; OBTAINING PROPERTY BY FALSE PRETENSE; OBTAINING SIGNATURE BY FALSE PRETENSE.**

As to matters of practice—See **PRACTICE IN CRIMINAL CASES.**

As to pleading—See **INDICTMENT.**

As to evidence—See **EVIDENCE, 1, 10, 11, 15, 16, 17, 18.**

1. Under an indictment for an "assault with intent to rob" the court should, if the evidence authorizes it, instruct the jury as to the offense of a common assault and battery. *Barnard v. Commonwealth* . . . 285
2. Aiders and abettors may be punished as principals under a statute creating a felony, unless it is plain from the nature of the offense that the intent of the statute is to inflict punishment only on the person actually committing the offense.

Under the statute providing for the confinement in the penitentiary "of any person" who shall feloniously break into a storehouse with intent to steal, aiders and abettors may be punished as principals. *Commonwealth v. Carter* . . . 527

**CURTESY—**

1. To entitle the husband to curtesy in the wife's land it is not necessary that she should in person have been in possession of the land at the time of her death; it is sufficient that another was in possession for her use. *Ellis v. Dittey* . . . 620
2. The allegation by the husband in his answer that the wife died "owning and possessing" the land sued for is sufficient, if supported by proof, to sustain his claim to curtesy. *Idem* . . . 620

**CUSTOM—**

Proof of custom of trade to show that title to personal property had passed—See **SALES.**

**CYCLONE—**

Duty of benefit society as to distribution of fund contributed for cyclone sufferers—See **TRUSTS, 4.**

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 Damages.
 

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**DAMAGES—**

As to right to plead unliquidated damages as a set-off—See **COUNTER-CLAIM AND SET-OFF**, 3.

As to competency of evidence as to expectancy of life to show extent of damage in actions for personal injuries—See **EVIDENCE**, 5.

As to measure of compensation for land condemned for railroad purposes—See **EMINENT DOMAIN**, 2, 3.

As to measure of for breach of covenant of seisin—See **WARRANTY**, 2.

As to receipt "in full settlement" of claim for—See **BURDEN OF PROOF**.

As to right of court to require plaintiff to remit part of excessive verdict—See **NEW TRIAL**, 2.

As to evidence in mitigation of damages—See **STREET RAILWAYS**, 2.

1. One who purchased a package of fertilizer without the required label being attached has not been damaged by the failure of the seller to comply with the statute, as he has used the fertilizer without paying for it; and he can not, therefore, recover any thing upon his counter-claim in this action to recover the purchase price of the fertilizer, plaintiff not being entitled to recover. *Vanmeter v. Spurrier, &c.* . . . . . 22
2. In actions for personal injuries the jury should be instructed that in estimating the damages they are to take into consideration the age and situation of plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injuries received, and the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury. *Greer v. Lou. & Nash. R. Co.* . . . . . 169
3. A verdict for five thousand dollars for the loss of two fingers is so excessive as to indicate passion or prejudice. *L. & N. R. Co. v. Foley.* . . . . . 220
4. Gross negligence is sufficient to warrant the finding of punitive damages, and, therefore, so far as the instructions in this case required the jury to find willful neglect in order to give punitive damages, they were too favorable to defendant. *L. & N. R. Co. v. Earl's Adm'rx* . . . . . 368
5. A verdict for \$4,000 for the "pain, anguish, loss of time," etc., suffered by the plaintiff's intestate during the ten days he lived after the accident, was not excessive. *Idem.* . . . . . 368
6. A verdict for \$26,000 for personal injuries set aside as excessive. *L. & N. R. Co. v. Long* . . . . . 410
7. If defendant was guilty of gross neglect, both compensatory and punitive damages may be awarded. *L. & N. R. Co. v. Long.* . . . . 410

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 Debtor and Creditor. Deeds.
 

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**DEBTOR AND CREDITOR—**

As to preference of creditors—See **ASSIGNMENTS BY OPERATION OF LAW.**

As to voluntary assignments—See **ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

**DECEDENT'S ESTATES—**

An action for the sale of land belonging to the estate of a deceased person must be brought in the county where the personal representative qualified if it involves a settlement of the estate and payment of debts or distribution or partition among the heirs, although the land lies in another county. *Walker, &c., v. Yowell's Adm'r.* 206

**DEDICATION—**

Where a sale of lots takes place according to maps showing squares, lots and streets laid out, and such lots are conveyed by deeds describing them as binding on or by designated streets, a dedication may be implied for benefit of purchasers of adjacent lots whose rights thus become involved, whether the municipality has formally accepted the dedication or not; but in this case all that can be reasonably inferred from the various deeds and maps is, that an extension of the street of which the strip of ground in controversy is now claimed to be a part might, at some time in future, be made, when the owner could, at his election, dedicate his land for the purpose, or demand compensation; therefore, a dedication can not be implied. *City of Covington v. McDonald, &c.* . . . . . 1

**DEEDS—**

Deed executed by execution defendant after land was levied on set aside on equitable terms—See **EXECUTIONS, 2.**

1. A deed may be delivered to a third person for the grantee, and if subsequently assented to by the grantee, it will be as good a delivery as if it had been made directly to him. And this is true, although the deed may not have been delivered to or accepted by the grantee until after the death of the grantor. *Colyer v. Hyden, &c.* . . . 180
2. Where the grantor handed to his wife a deed in which his children were named as grantees, and told her to put it away or to take care of it, and after the death of the grantor she delivered it to the grantees, there was no delivery of the deed so as to pass the estate. *Idem* . . . . . 180

3. Whether a writing is a deed or a will depends upon the intention of the maker as gathered from the whole instrument.

The writing in question in this case construed to be a deed taking effect at once, and reserving to the grantor merely a life estate. *Phillips, &c., v. Thomas Lumber Co* . . . . . 445

4. A mortgage is a deed within the meaning of the statute, which provides that the wife shall not be endowed of land sold to satisfy a

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 Deeds. Detaining Woman Against her Will.
 

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## DEEDS—Continued

lien "created by deed" in which she joins. *Schweitzer v. Wagner* . . . . . 458

## DEFEASIBLE FEE—See DEVISE, 2.

## DEFINITIONS—

1. Authority to insure property in *vicinity* of city construed. *Howard Ins. Co. v. Owen's Adm'r* . . . . . 197
2. Word *lineage* in will treated as equivalent to *heirs*. *Lockett, &c., v. Lockett, &c.* . . . . . 289
3. Refusal of the county court to probate a will for any cause is a *rejection* of the will. *Preston, &c., v. Fidelity Trust and Safety Vault Co.* . . . . . 295
4. *Actual notice* and *constructive notice* defined. *Chesapeake, &c., R. Co. v. Mullins*. . . . . 855
5. *Mortgage* held to be a *deed* within meaning of particular statute. *Schweitzer v. Wagner* . . . . . 458
6. *Executors* held to be *trustees* within meaning of particular statute. *Craig v. Wilcox's ex'or.* . . . . 484
7. What constitutes *vacancy* in office determined. *Long v. Bowen* . . 540

## DEGREES OF OFFENSE—See CRIMINAL LAW, 1.

## DELIVERY—

As to delivery of deed—See DEEDS, 1, 2.

As to delivery of life insurance policy—See INSURANCE, 6.

## DESCENT AND DISTRIBUTION—

1. The collateral kindred of the mother of a bastard can not inherit from the bastard. *Croan, &c., v. Phelps' Adm'r.* . . . . 218
2. Upon the death of a bastard without kindred who can lawfully inherit from him his widow takes the whole estate. *Idem.* . . . 218
3. An agreement by one person to make another his heir is not enforceable, and no action lies for its breach. *Davis, &c., v. Jones' Adm'r* . . . . . 320

## DETAINING WOMAN AGAINST HER WILL—

1. The offense of unlawfully detaining a woman against her will, with intent to have carnal knowledge with her, may be committed against an insane woman.

In this case the court properly instructed the jury that any act done by defendant toward the alleged victim (an insane woman) other than acts of kindness, courtesy and friendship, were done "against her will." *Higgins v. Commonwealth* . . . . . 54

2. As the room in which it was claimed the alleged detention occurred was exposed and used at all hours of the day and night, testimony as to its condition on the day following the trouble in question was not competent. *Idem* . . . . . 54

## Devise.

## DEVISE—

As to devise of homestead—See HOMESTEAD, 4.

1. Under a devise of land by a testator to his daughter "and her lineage," the daughter takes a fee-simple estate, the word "lineage" being used in the sense of heirs. *Lockett, &c, v. Lockett, &c.* 289
2. A devise of an estate, generally or indefinitely, with a power of disposition, carries a fee. But in construing the instrument in cases where the party has a power and also an interest, the intention is the great object of inquiry.  

A testator, after devising his estate to an unmarried sister to enable her to take care of the children of a deceased sister, provided that if the sister should be alive when the children mentioned were "raised and old enough to no longer require care of guardian and support," she should "continue the ownership of the estate and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is that my brothers are to dispose of the estate for the benefit of my heirs at law." *Held*—That the sister took the fee defeasible upon the contingency of her dying without children, and, therefore, as she died leaving children, one to whom she conveyed the fee became invested upon her death with the absolute title. *Mitchell, &c., v. Campbell, &c.* . . . . . 347
3. Under a devise of property by a testator to be "equally divided between the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living," the children of the testator's brothers and sisters take *per capita* and not *per stirpes*, their parents being alive not only at the date of the will, but at the date of its publication. *McFatrige, &c., v. Holtzelaw* . . . 352
4. A devise by a testator "to my beloved wife and children," naming the persons intended, and including in the list a step-son, and omitting one of the testator's own children, gives to the persons named a joint and equal interest in the property devised, and not merely a life estate to the wife, remainder to the other persons named. *Hazelett, &c., v. Farthing* . . . . . 421
5. Where a paper referred to by a testator as a part of his will is clearly and certainly identified, it is not necessary that it should be probated and recorded with the will in order to give it effect as a part of the will. But a testator having provided in his will for a division of his lands among his children in accordance with "deeds" which he refers to as having been made by him, mere memoranda made by a surveyor and not signed by the testator can not be identified by parol testimony as the "deeds" intended by the testator, as this would be to change by parol testimony the entire character

## Devise. Dower.

**DEVISE—Continued.**

- of the instrument referred to as a part of the will. *Tuttle, &c., v. Berryman* . . . . . 553
6. Under a devise to a person to be paid over when the estate is settled and debts paid the interest vests at once, only the time of possession being postponed. *Moore v. Offutt* . . . . . 568
7. Devise construed to create in devisee a life estate in one-half his share and the fee in the other half. *Idem* . . . . . 568
8. Under a devise by a testator to his wife of "one-third" of his entire estate, real and personal, followed by the words: "That is, she is to have all the land during her life," the widow took a life estate in all the land owned by the testator, and not merely in one-third. *Young, &c., v. Morehead, &c.* . . . . . 608

**DISORDERLY HOUSE—**

1. An actual disturbance of the public peace is not indispensable to constitute the offense of keeping a disorderly house. It is enough that acts be there done contrary to law and subversive of public morals, health or safety. *Kneffler, &c., v. Commonwealth* . . . . . 359
2. A place where persons habitually assemble to bet or wager money or property on the prospective rise and fall in the prices of stocks, bonds, grains, etc., is, in law, a common gambling house, and the person owning and controlling it is guilty of the offense of keeping a disorderly house, although there is no penal statute applicable to that particular species of gambling. *Idem.* . . . . 359

**DISTRIBUTION—**

See DESCENT AND DISTRIBUTION.

As to distribution of fund contributed for sufferers by storm—  
See TRUSTS, 4.

As to whether *per capita* or *per stirpes*—See DEVISE, 8.

**DIVISION—See PARTITION.****DIVORCE—**

The insanity of the wife does not entitle the husband to a divorce. *Pile v. Pile* . . . . . 808

**DONATIONS—**

As to distribution of fund contributed for sufferers by storm—  
See TRUSTS, 4.

**DOWER—**

Error to require married woman to relinquish dower—See VENDOR AND VENDEE, 6.

1. The wife is not entitled to dower in land of the husband sold to satisfy a lien created by mortgage in which she joined, a mortgage being a "deed" within the meaning of section 5, article 4, chapter 52, of the General Statutes. *Schweitzer v. Wagner.* . . . . 458

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Dower. Ejectment.

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**DOWER—Continued.**

2. A widow is not entitled to dower in a remainder or reversionary interest of the husband in land where there was no seizin by the husband in fact or in law at any time during the marriage. Therefore, where a husband who was entitled to the reversion in land upon the termination of a dower interest, died before the death of the dowress, his widow was not entitled to dower therein; and this is true, although he was in possession of the land prior to the allotment of dower, as he held the possession subject to the permanent right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession by virtue of that right, he stood in the same attitude that he would have done if he had lost the right of possession by a superior title. *Carter v. McDaniel* . . . . . 564.
3. The purchaser of a dower interest in land having remained in possession after the death of the dowress, he is liable to the heirs for rent from that time. *Idem* . . . . . 564
4. A remainderman having died before the life tenant, his widow is not entitled to dower or homestead. *Young, &c., v. Morehead, &c.* . 608

**EASEMENTS—See PASSWAYS.**

1. Mere non-user is not an abandonment of an easement created by deed; but if there is an actual adverse user by the owner of the servient estate for fifteen years, the easement is extinguished. *Lou. & Nash. R. Co. v. Quinn, &c.* . . . . . 310
2. An easement may be acquired and perfected by prescription so as to pass by descent to heirs at law; and whether acquired by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of fifteen years by even a tortfeasor. *Hook, &c., v. Joyce* . . . . . 450
3. Burial of the dead body in a cemetery lot is the only possession, when claimed and known, necessary to ultimately create complete ownership of the easement so as to render it inheritable; and as long as gravestones stand, marking the place as burial-ground, the possession is actual, adverse and notorious. Nor can there be an actual adverse possession by an intruder, nor running of the statute of limitations in his favor, while such gravestones stand there indicating by inscription the previous burial of another. *Idem* . . 450

**EJECTMENT—**

1. Plaintiffs in ejectment must show a right of entry in themselves, and a legal estate in the premises existing in themselves, at the time the suit was commenced. And where they claim the land in controversy as the heirs of another, the defendant may, without denying their heirship or the ownership of their ancestor, deny their ownership and assert his claim, without taking upon himself the

## Ejectment. Elections.

## EJECTMENT—Continued.

- burden of proving his ownership. *Howard, &c., v. Singleton, &c.* . . . . . 886
2. This action for a division of land among the plaintiffs is to be regarded as a suit in ejectment as to defendants, who assert title by adverse possession alone; and defendants have no right to insist that separate actions should be instituted by plaintiffs in accordance with a division of the land already had, as plaintiffs had the right to repudiate that division and seek another partition. *Smith, &c., v. Norment, &c.* . . . . . 624
8. Whether the possession of defendants had ripened into a perfect title was a question for the jury, this being an issue out of chancery to try the question of title. *Idem* . . . . . 624

## ELECTIONS—

1. Section 148 of the new Constitution, which provides that no county officer "shall be elected in the same year in which members of the House of Representatives of the United States are elected," did not forbid an election in 1892 to fill a vacancy in the office of coroner, although members of the House of Representatives of the United States were then elected. Section 148 of the Constitution, even conceding that it applies to vacancies, can not be given full effect until the elective machinery of the new Constitution shall have been put into full running order. *Berry v. McCollough* . 247
2. Where the time for holding an election is fixed by the Constitution or by statute, a notice of the election is not essential to its validity. *Idem* . . . . . 247
3. The election of circuit judges on the first Tuesday after the first Monday in November, 1892, was valid, whether or not the act of the Legislature regulating the election of judges at that time was passed in accordance with the provisions of the Constitution. And as the provision of the Constitution directing the election to be held at that time is imperative, it was not necessary that there should be an emergency clause to the act of the Legislature regulating the election. *Hall v. Commonwealth* . . . . 322
4. Where an act of the Legislature which provided for taking the sense of the voters of the district upon the question of imposing a tax for a specific purpose, provided that the county judge, "upon a written petition signed by at least ten legal voters who are taxpayers," should make an order in his order-book "at the next regular term of his court after he receives said petition," directing the sheriff to open a poll, etc., the provision fixing the term of court at which the order should be made, was mandatory, and an election held under an order made by the county judge at the same term of court at which the petition was filed was void. *Doores, &c., v. Varnon, &c.* . . . . . 507



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Elections. Eminent Domain.

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## ELECTIONS—Continued.

5. An appeal lies from the decision of the contesting board of elections at the instance of any person in interest feeling himself aggrieved; and the fact that upon the decision of the contesting board finding the vote to be a tie, the right to office was determined by lot, as provided by statute, does not deprive the unsuccessful candidate of the right of appeal from the decision of the board by which the vote was found to be a tie. *Imboden v. Cully* . . . . . 45
6. The finding of the lower court that a certain voter was of legal age will not be disturbed, the testimony being conflicting, and especially when the preponderance of the proof sustains the decision. *Idem* . . . . . 45

## EMERGENCY CLAUSE—

As to necessity for—See CONSTITUTIONAL LAW, 3.

## EMINENT DOMAIN—

1. Section 1 of article 2, chapter 94, General Statutes, is unconstitutional in so far as it authorizes the opening of a private passway for the mere purpose of enabling a citizen to pass from a tract of land upon which he resides to another tract owned by him, upon which no one resides, the opening of such a passway not being necessary to enable him to attend to his public duties. Nor is the citizen entitled to such a passway by reason of the fact that it is necessary to afford him an outlet to market or to his county seat from the tract upon which he does not reside, he having such an outlet from the track upon which he does reside. *Shake v. Frazier* . . . 143
2. In condemning land for railroad purposes the diminution in value of the whole tract by reason of the appropriation of the land actually taken is to be estimated as a part of the compensation to which the owner is entitled. And from this amount nothing can be deducted by reason of the benefits and advantages that may reasonably be anticipated from the construction and operation of the road. *West Va., &c., R. Co. v. Gibson, &c.* . . . . . 234
3. In estimating the value of property taken for public use, the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by the use to which the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The issue is not what the land is worth to the corporation seeking to appropriate it, nor the expense that it would be compelled to incur in obtaining other property, or in fitting it for its business if it should fail to get the property sought to be condemned. *Idem*. . . . . 234
4. Where land condemned for railroad purposes was surveyed and the

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 Eminent Domain. Estoppel.
 

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**EMINENT DOMAIN**—Continued.

report of survey accepted by both parties, the railroad company taking possession of only so much land as was designated by the report of survey as that condemned, after fifteen years the company can not recover an additional strip of land, which it claims was included by the judgment in the condemnation proceedings, but, by mistake, omitted by the surveyor. The possession of the owner of the servient estate being adverse, the railroad company's right is barred. *Lou. & Nash. R. Co. v. Quinn, &c.* . . . . 310

5. *Mandamus* does not lie to compel the county judge upon the application of common school trustees to issue a writ of *ad quod damnum* for the purpose of condemning land on which to build a school-house. *Wright, &c. v. Baker.* . . . . 343
6. In this action against a railroad company to recover land upon which it has built its road, the defendant can yet have its road-bed condemned as a right of way, and the court has the right to suspend the writ of possession for a reasonable time in order for it to take that proceeding if it applies for it. *Owensboro, &c., R. Co. v. Harrison.* . . . . 408

**EMPLOYERS**—See **MASTER AND SERVANT**.**ENTRIES**—

Testimony as to correctness of original entries—See **EVIDENCE**, 14

**EQUITY**—

As to equitable judgment in suit for partition—See **PARTITION**, 1.

As to right of court of equity to order sale of real estate held in trust for life—See **LIFE ESTATES**.

- A deed executed by an execution defendant to land on which the execution had been levied, being executed in good faith pursuant to a prior written contract, conferred an equitable interest on the grantee and while it may be set aside it must be done on equitable terms. Therefore, in an action by the execution plaintiffs, purchasers at the execution sale, to set aside the deed and quiet their title, the chancellor properly set aside the execution sale and gave plaintiffs merely a prior lien for their debt. *Brannin, Brand & Glover v. Broadus, &c.* . . . . 38

**ESTATES**—

Created by devise—See **DEVISE**.

**ESTATES OF DECEASED PERSONS**—See **DECEDENT'S ESTATES**.**ESTATES FOR LIFE**—See **LIFE ESTATES**.**ESTOPPEL**—

As to verbal agreement as to land operating as an estoppel—See **PARTITION**.

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 Estoppel. Evidence.
 

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**ESTOPPEL—Continued.**

1. A void deed from wife to husband can not be treated as an estoppel. *Bohannon, &c., v. Travis, &c.* . . . . . 59
2. Where the obligor in a note accompanies it with a certificate that there is no defense against it, he is not estopped even as against one who has purchased the note upon the faith of that certificate to impeach the note for fraud, provided he alleges and proves that the certificate was also obtained by fraud. *Hill v. Thixton, &c.* . . . . . 96
3. A married woman will be estopped to plead her inability to contract in bar of the consequences of her own fraud. *Newman v. Moore* . 147
4. A defendant will not be heard to say, for the purpose of claiming the concluding argument to the jury, that an attempted denial was bad. *American Accident Co. v. Reigart* . . . . . 547

**EVIDENCE—**

As to materiality of evidence of absent witnesses on trial for homicide—See **CONTINUANCE**, 1, 2.

Competency of parol testimony to identify paper referred to as part of will—See **WILLS**, 8.

As to competency of evidence in action for ejection of passenger from street-car—See **STREET RAILWAYS**, 2, 8.

1. Upon the trial of defendant for unlawfully detaining an insane woman against her will with intent to have carnal knowledge with her, as the room in which the alleged detention occurred was exposed and used at all hours of the day and night, testimony as to its condition on the day following the trouble in question was not competent. *Higgins v. Commonwealth* . . . . . 54
2. In an action against a railroad company to recover for the loss of plaintiff's store-house by fire alleged to have resulted from defendant's negligence in allowing sparks to escape from its locomotive, the fire having spread from defendant's depot, which was first ignited by the escaping sparks, it was competent for plaintiff to show the combustible character of the depot, as the question whether defendant was negligent in the operation of its locomotive depended to some extent on the character of the surrounding buildings. And besides, the combustibility of the depot was a circumstance bearing on the question as to whether the depot was actually fired by the sparks; and this was true, although the court struck from plaintiff's petition all allegations as to defendant's negligence growing out of the combustible character of the material in the depot. *Cincinnati, &c., R. Co. v. Barker, &c.* . . . . . 71
3. In an action against a railroad company to recover damages for personal injuries as the only negligence alleged in the petition related to the act of driving or operating the train, it was error to admit evidence as to the unsafe and defective condition of the track, or of

## Evidence.

## EVIDENCE—Continued.

- any portion of the train's make-up. *Greer v. Lou. & Nash. R. Co.* . . . . . 169
4. Although an amended petition tendered by plaintiff setting up additional acts of negligence should have been filed, yet the court having rejected it, it was error to defendant's prejudice to admit evidence as to such additional acts of negligence, such evidence not being competent under the original petition. *Idem.* . . . . 169
  5. In an action to recover damages for personal injuries permanent in their nature, it is not improper to admit in evidence standard life tables to show the expectancy of life of a person of the age of plaintiff. But the proof must be taken subject to the conditions surrounding the plaintiff, and hence the existence of disease tending to shorten life may be shown. *Idem.* . . . . 169
  6. A jury may be sent, even after a case has been submitted to them, to view the place where any material fact occurred. *Louisville, &c., R. Co. v. Schick* . . . . . 191
  7. In this action against a railroad company to recover damages for personal injuries received by plaintiff while coupling cars in the discharge of his duty as brakeman, the declaration of the car inspector that he had been troubled with coupling of the two cars in question before the train started from the yard was competent as a part of the *res gestæ*, although made ten minutes after the injury, and after plaintiff had been carried to the depot near where the injury occurred. But even if proof of that declaration had been incompetent, it would not have been prejudicial, because the defective condition of the coupling apparatus was otherwise fully proved. *L. & N. R. Co. v. Foley* . . . . . 220
  8. There being evidence conducing to support a verdict for plaintiff, the court will not set it aside upon a mere preponderance of the evidence in favor of defendant. *Mutual Life Insurance Company of New York v. Thomson, &c.* . . . . . 253
  9. As defendant, after discovering the absence of a witness who was present and sworn at beginning of trial, did not exercise proper diligence to coerce his attendance, the court did not abuse its discretion in refusing to permit the witness to testify upon his appearance in court for that purpose, after plaintiffs had closed their evidence, that of defendant having been previously given. *Idem.* . . . . 253
  10. Upon a trial for murder it was competent for defendant under the circumstances of the particular case to show that deceased was a man of violent temper, and was in the habit of carrying concealed weapons just prior to the shooting. *Riley v. Commonwealth* . . . 266
  11. Testimony showing the feeling and mental condition of deceased at or near the time he had a conversation which was brought out by defendant was competent, as it was closely interwoven with that conversation and formed a part of the transaction. *Idem.* . . . 266

## Evidence.

## EVIDENCE—Continued.

12. In this action by an administrator to recover for the death of his intestate, statements made by the intestate as to how the injury occurred having been brought out by defendant, it was competent for plaintiff to prove all that was said, as all the statements were made within a few seconds and evidently formed part of the same conversation. Besides, as the expressions were within a few seconds after the accident, they were competent as forming part of the transaction. *L. & N. R. Co. v. Earl's Adm'rx* . . . . . 368
18. In this action to recover the purchase price of tobacco which was destroyed by fire before it was delivered, in which the defense was that the title had not passed, it was competent for plaintiffs to show, in the absence of an express agreement between the parties in regard to manner of ascertaining net weight of the tobacco, that according to the custom of the tobacco trade, defendant, as purchaser, was required to take it at the last ascertained weight, looking to plaintiffs to make good any loss or diminution. *Thompson v. Brannin, Brand & Glover* . . . . . 490
14. Independent of the provision of the Civil Code authorizing a person to testify for himself as to correctness of original entries, it was competent for plaintiffs to read to the jury from their warehouse books the original entries in reference to the alleged sale, and to exhibit the unsigned sale notes or invoices, for the purpose of showing they had complied with the conditions of the sale, or were ready to do so. *Idem.* . . . . . 490
15. Upon a trial for murder it was improper to allow a witness to testify as to inducements offered him by one of defendant's relatives and witnesses to testify for defendant, but as he was not present at the killing, and could have known nothing touching which he could have sworn for defendant material to his defense, the testimony was not prejudicial, as it is not to be presumed an intelligent jury would hold defendant responsible for the supposed imprudences of his friends, especially when they appear incredible and absurd on their face. *Roberts v. Commonwealth.* . . . . . 499
16. The Commonwealth having been allowed, without objection, to prove by a witness for defendant that he was under indictment for perjury, it was competent for defendant to prove by the witness that the indictment had been procured by the relatives and friends of deceased who were prosecuting defendant; but as the indictment for perjury grew out of the testimony of the witness on a former trial of the case being tried, and all the testimony on the subject-matter of the alleged perjury was heard by the jury, they were in an attitude to judge of the weight to be given the pendency of the indictment as affecting the credibility of the witness, and, therefore, defendant was not prejudiced by the refusal of the court to allow

## Evidence. Excessive Verdict.

**EVIDENCE—Continued.**

- the witness to state by whom the indictment for perjury had been procured. *Idem* . . . . . 499
17. A letter written by a husband to his wife while he was confined in jail upon a charge of murder is to be regarded as a confidential communication, and, therefore, not competent against him upon the trial to break the force of his and other testimony tending to show that deceased and his wife were criminally intimate, and that he committed the homicide in a state of passion and excitement caused by belief that such was the fact. *Scott v. Commonwealth* . . . . . 511
18. Although the defendant was found guilty of manslaughter only, the error in admitting the letter as evidence was prejudicial, as it may have influenced the jury in fixing the punishment. *Idem* . . . 511
- 19 Where an affidavit for a continuance was read as the deposition of absent witnesses, it was not error to allow the Commonwealth to impeach the reputation of the absent witnesses, as their testimony was placed upon the same footing as that of witnesses who were present. *Johnson v. Commonwealth* . . . . . 578
20. A variance between an indictment for false swearing, and the record of the proceeding in which the false oath is alleged to have been taken as to the date of the trial of the proceeding, does not render the record incompetent as evidence. *Commonwealth v. Davis* . 612

**EXCAVATIONS—**

As to liability to neighbor for injury resulting from—See **SUPPORT**.

**EXCEPTIONS—**

Appearance entered by [filing exceptions to commissioner's report—See **APPEARANCE**.

- In criminal cases decisions of the court upon challenges to the panel and for cause are not subject to exception. *Roberts v. Commonwealth* . . . . . 499

**EXCESSIVE VERDICT—**

As to right of court to require plaintiff to remit part of verdict—See **NEW TRIAL, 2**.

1. A verdict for five thousand dollars for the loss of two fingers is so excessive as to indicate passion or prejudice. *L. & N. R. Co. v. Foley* . . . . . 220
2. A verdict for four thousand dollars for the "pain, anguish, loss of time," &c., suffered by plaintiff's intestate during the ten days he lived after the accident was not excessive. *L. & N. R. Co. v. Earl's Adm'rx* . . . . . 368
3. A verdict for twenty-six thousand dollars for personal injuries set aside as excessive. *L. & N. R. Co. v. Long* . . . . . 410

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Exchange. Executors and Administrators.

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**EXCHANGE—**

As to exchange of lottery tickets induced by fraud—See **LOTTERIES**, 1.

**EXECUTIONS—**

1. The plaintiff in an execution may leave a specific bid with the officer which the latter may cry without violating section 2, article 15, chapter 88, General Statutes, which simply prohibits him in his own behalf from buying or bidding for property at his own sales. *Brannin, Brand & Glover v. Broadus, &c.* . . . . . 33
2. While a deed executed by an execution defendant to land on which the execution had been levied, although executed pursuant to a prior written contract, was inoperative to defeat the demand of the plaintiffs in the execution, yet if set aside it must be done on equitable terms and in an action by the execution plaintiffs, purchasers at the execution sale, to set aside the deed and quiet their title, the chancellor properly set aside the execution sale and gave plaintiffs merely a prior lien on the land for their debt. *Idem* . 33

**EXECUTORS AND ADMINISTRATORS—**

1. Where a surety in the bond of a personal representative procures the execution of a new bond containing a stipulation indemnifying him against "any loss, cost or damage legally incurred by reason of said suretyship," if judgment is obtained against him upon the old bond, and he in good faith prosecutes an appeal from the judgment, the indemnitor is liable to him for the legal or court costs incurred upon the appeal, and also the damages upon affirmance of the judgment. But unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, the extraordinary costs of the appeal, such as attorneys' fees, are not chargeable to him. *Brandt's Ex'or v. Donnelly* . . . . . 129
2. In an action against the indemnitor upon the bond executed by him, it is no defense that the principal appeared and executed the bond without notice having been served on him. *Idem* . . . . . 129
3. The act of April 29, 1890, which provides that "no administrator or executor shall sell any dividend-paying stocks, bonds or other property which the decedent owned at his death until so ordered by a court of general equity jurisdiction in the county where letters of administration were granted or will recorded," does not apply where a testator has by his will invested his executor with discretionary power to make such sales; and while an executor may be enjoined from abusing such a discretion where it is affirmatively alleged and shown he is about to do so to the prejudice of other beneficiaries of the will, no such state of case is shown here. *Trimble's Ex'or v. Lebus, &c.* . . . . . 304

## Executors and Administrators. Fellow-Servants.

**EXECUTORS AND ADMINISTRATORS—Continued.**

4. Whether the remedy sought by the executrix here be for direct recovery of the purchase price of bank stock sold by her under a discretionary power conferred by the will, or for specific performance of the contract of sale, the action is transitory and not local. *Idem*, 804
5. An action against a master to recover damages for personal injuries resulting from the negligent driving of his servant survives to the personal representative of the person injured. *Perkins v. Stein & Co.* . . . . . 488
6. Where a testator by his will places property under the "control" of his executors, with power to them or to the "survivor" to pay the income to certain persons for life and then to their children, if they have any, the executors are to be regarded as trustees within the meaning of the statute providing for the sale of property held in trust for the life of one person, remainder to persons not to be ascertained until the death of the life tenant. *Craig v. Wilcox's Ex'or.* . . . . . 484

**EXEMPTIONS—**

As to exemptions from taxation—See **TAXATION**, 1, 10.

**EXPECTANCY OF LIFE—**

As to competency of evidence as to, in actions for personal injuries—See **EVIDENCE**, 5.

**FALSE PRETENSES**—See **OBTAINING PROPERTY BY FALSE PRETENSES**; **OBTAINING SIGNATURE BY FALSE PRETENSES**.

**FALSE SWEARING—**

1. To convict for false swearing under the statute it is essential to allege, in the indictment and prove on trial that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath; and these two facts can be properly shown alone by the record of the proceeding in which the false oath is alleged to have been taken. *Commonwealth v. Davis* . . . . . 612
2. In a prosecution for false swearing, the date of the commission of the offense is not material, and, therefore, a variance between the indictment and the record of the proceeding in which the false oath is alleged to have been taken as to the date of the trial of that proceeding does not render the record incompetent as evidence. *Idem* . . . . . 612

**FEDERAL COURTS—**

Sale void for want of sufficient publication of warning order—  
See **JUDICIAL SALES**, 1.

**FELLOW-SERVANTS**—See **NEGLIGENCE**, 6, 7.



## Fertilizers. Forgery.

## FERTILIZERS—

1. As the fees which the statute "to regulate the sale of fertilizers" authorizes to be collected from any person selling, or offering to sell, a commercial fertilizer, are intended to be used for the single purpose of maintaining the Experiment Station, they can not be regarded as taxes, and do not render the statute liable to the objection that it imposes double taxation. *Vanmeter v. Spurrier, &c.* . . . 22
- 2 The statute can not be construed to authorize a levy of an impost on inter-state commerce beyond what is necessary to insure inspection. *Idem* . . . . . 22
3. A contract for the sale of a fertilizer not labeled as required by the statute is void. *Idem* . . . . . 22
4. The attaching of the required label to each package of fertilizer is necessary to constitute a compliance with the provisions of the statute. It is not sufficient that a sample of the fertilizer has been analyzed by the Experiment Station. *Idem* . . . . . 22
5. One who purchased a package of fertilizer without the required label being attached has not been damaged by the failure of the seller to comply with the statute, as he has used the fertilizer without paying for it; and he can not, therefore, recover any thing upon his counter-claim in this action to recover the purchase price of the fertilizer. *Idem* . . . . . 22

## FINAL ORDER—

1. An appeal lies from a judgment dissolving an injunction where it is rendered on final hearing, and as part of a judgment dismissing the petition. *Pendergest, &c., v. Heekin, &c.* . . . . . 384
2. As a judgment dismissing plaintiff's petition and dissolving his injunction disposed of all the issues in the case it was final, although a counter-claim filed by defendant was not in terms disposed of. *Elizabethtown, &c., R. Co. v. Ashland, &c., St. Ry. Co.* . . . . . 478

## FIRE INSURANCE—See INSURANCE, 1-5, 8.

## FIRES—

As to liability of railroad company for loss resulting from its negligence in allowing sparks to escape from locomotive. See RAILROADS, 1-5.

- Loss falls on vendee where house burns between date of contract of sale and time fixed for delivery of possession. *Henderson, &c., v. Perkins.* . . . . . 207

## FORGERY—

1. Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. It is not necessary that the whole instrument should be made false or fictitious. *Commonwealth v. Hide.* . . . . . 517
2. The alteration of a check constituted a forgery, although the person to

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 Forgery. Fraud.
 

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**FORGERY—Continued.**

whom the check was presented for payment could, by close observation, have detected the forgery and prevented the consummation of the fraud. *Idem* . . . . . 517

3. Upon the trial of the payee for the forgery, the fact that he alone had possession of the check, so far as the proof shows, from the time of its execution until its presentation for payment, coupled with the fact that he alone got the benefit of the change made, was sufficient to authorize the conclusion that he was guilty of the forgery, and therefore the case should have been submitted to the jury. *Idem*, . . . . . 517

**FRAUD—**

As to right to rescission for false representation as to value—See **VENDOR AND VENDEE**, 8.

Ante-nuptial contract set aside for fraud—See **HUSBAND AND WIFE**, 8.

As to gifts by father to children in fraud of wife's rights—See **HUSBAND AND WIFE**, 4.

As to conveyances in fraud of creditors—See **FRAUDULENT CONVEYANCES**.

1. Where the obligor in a note accompanies it with a certificate that it is a *bona fide* debt against him, that "there is no offset, discount or counter-claim or defense against the same," and that it will be paid at maturity, he is not estopped, even as against one who has purchased the note upon the faith of the certificate, to impeach the note for fraud, provided he alleges and proves that the certificate was also obtained by fraud. *Hill v. Thixton, &c.* . . . . . 96
2. Where one by fraudulent representations obtains possession of a lottery ticket which has drawn a prize, and receives the money thereon, he is to be regarded as collecting the money for the use of the rightful owner of the ticket, who may maintain an action therefor, although he originally purchased the ticket from defendant in violation of law, and parted with it to defendant in exchange for another lottery ticket, the exchange being induced by defendant's fraud. *Martin v. Richardson* . . . . . 188
3. A contract by which the owner of a large body of land, valuable chiefly for its minerals and timber, granted the right to take minerals and timber from the land in consideration of the payment of twenty-five cents an acre, when the right was worth from six to ten times that amount, was properly set aside by the chancellor, the vendor being an old man who, by reason of disease, was not qualified to transact business, and who did not understand the true meaning and effect of the bond he signed. *Horsley v. Asher's Heirs* . . . . . 814

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Frauds, Statute of. General Statutes.

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**FRAUDS, STATUTE OF—**

As to verbal agreement as to land operating as an estoppel—See **PARTITION**.

1. A verbal agreement by the holder of the legal title to land that another shall be interested in the title, or an agreement to buy land from a stranger for the benefit of another without that other paying the consideration, comes directly within the statute of frauds, and does not create an enforceable trust. Commonwealth, for, &c., v. Chesapeake, &c., R. Co. . . . . 16
2. Where a contract for the sale of land described the vendor as "of Rocky Hill Station, Kentucky," and the property sold as "my home-place and store-house," there was a sufficient memorandum of the contract to take it out of the statute of frauds. Henderson, &c., v. Perkins . . . . . 207

**FRAUDULENT CONVEYANCES—**

As to preference of creditors—See **ASSIGNMENTS BY OPERATION OF LAW**.

Where a creditor assails a transfer made by his debtor upon the ground of actual fraud and obtains his attachment, he has, upon establishing the fraud, a prior lien, and other creditors coming into the action have subordinate liens, dating from the filing of their petitions. And in the absence of any pleading bringing the case within the statute against fraudulent preferences, it is error to the prejudice of the debtor to adjudge that there has been an assignment by operation of law of all his estate for the benefit of creditors. Stamper, &c., v. Hibbs, &c. . . . . 358

**FUTURES—See GAMING.****GAMING—**

A place where persons habitually assemble to bet or wager money or property on the prospective rise and fall in the prices of stocks, bonds, grain, &c., is in law a common gambling-house, and the person owning and controlling it is guilty of the offense of keeping a disorderly house, although there is no penal statute applicable to that particular species of gambling. Knefler, &c., v. Commonwealth . . . . . 359

**GIFTS—**

As to gifts by father to children in fraud of wife's rights—See **HUSBAND AND WIFE, 4**.

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**GUARDIAN AND WARD—**

As to necessity for execution of bond by guardian in action for sale of real estate—See **LIFE ESTATES, 1.**

In an action by a guardian under section 490 of the Civil Code for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party; and, therefore, where he is made a defendant, it is not necessary that he should be served with process. *Howard, &c., v. Singleton, &c.* . . . . . 386

**HEIRS—**

1. The collateral kindred of the mother of a bastard can not inherit from the bastard. *Croan, &c., v. Phelps' Adm'r.* . . . . . 213
2. Upon the death of a bastard without kindred who can lawfully inherit from him, his widow takes the whole estate. *Idem* . . . . . 213
3. An agreement by one person to make another his heir is not enforce-

## Heirs. Homicide.

## HEIRS—Continued.

able, and no action lies for its breach. The statute points out the only way in which one person can make another his heir. *Davis, &c., v. Jones' Adm'r* . . . . . 820

## HIGHWAYS—See ROADS.

## HOMESTEAD—

1. A preferred creditor to whom the debtor's homestead has been transferred with other property may retain the homestead, the debtor having the right to dispose of that as he pleased. *Baker, &c., v. Kinnaird* . . . . . 5
2. A debtor may, by will as well as deed, invest his wife or child with title to his homestead free from the claims of his creditors. *Pendergest, &c., v. Heekins, &c.* . . . . . 384
3. A debtor residing with his family on land devised to him is entitled to a homestead therein against debts created prior as well as debts created subsequent to the time he acquired title.  
In this case a widow with a family is held to be entitled to a homestead in land devised to her by the husband, as against debts created by her after the death of the testator. *Idem* . . . . . 384
4. Where a testator disposes of his homestead by his will, and the widow accepts the provisions of the will, neither she nor the testator's children can claim a homestead right, a person having the right to dispose of his homestead by his will as he may choose, subject only to the right of the wife to renounce the will and claim under the statute. *Hazlett, &c., v. Farthing* . . . . . 421
5. Where a debtor, after leaving his home in one town moved to two other towns in succession, engaging first in one business and then in another in the last town to which he moved, he can not, after the property originally occupied by him as a home has been sold to satisfy a debt contracted by him while thus engaged in business, be allowed to claim a homestead therein upon the ground that his abandonment of his home was only temporary, and with a fixed purpose to return, his conduct being inconsistent with such an intention. *Mattingly, & Co. v. Berry* . . . . . 544

## HOMICIDE—

As to materiality of evidence of absent witnesses on trial for homicide—See CONTINUANCE, 1, 2.

As to competency of testimony—See EVIDENCE, 15, 16, 17, 18.

As to indictment—See INDICTMENT, 4.

1. Upon a trial for murder, there being no testimony tending to show that the accused sought or provoked the difficulty, it was error to give any instruction upon that hypothesis. But even if the evidence authorized an instruction of that character, it was misleading to tell the jury they could not acquit upon the ground of self-defense.

## Homicide.

**HOMICIDE—Continued.**

- if they believed "from all the evidence" that immediately before the shooting "the defendant, by his own wrongful acts then and there done by him," gave the deceased reasonable grounds to believe that his life was in danger, as the instruction intimates that defendant's acts were wrongful; and, besides, requires the jury to believe only from a preponderance of the evidence, and not to the exclusion of a reasonable doubt, the facts that are said to be sufficient to deprive defendant of the right of self-defense. *Riley v. Commonwealth*, 266
2. The court properly refused an instruction to the jury on the subject of defendant's right to pursue the deceased, as the testimony does not, in fact, show pursuit. *Idem* . . . . . 266
  3. The evidence did not authorize an instruction requiring defendant to seek some "reasonable means of escape from the impending peril" before using the necessary, or apparently necessary, means at hand to protect himself. *Idem* . . . . . 266
  4. As the defendant had been informed of threatening language used by deceased, and there was some proof tending to show the deceased had, in anger, sought him, and the Commonwealth was allowed to show that deceased had no pistol on his person at the time of the killing, it was competent for defendant to show that deceased was a man of violent temper, and was in the habit of carrying concealed weapons just prior to the shooting. *Idem*. . . . . 266
  5. Testimony showing the feeling and mental condition of deceased at or near the time he had a conversation which was brought out by defendant was competent, as it was closely interwoven with that conversation and formed a part of the transaction. *Idem* . . . 266
  6. The rule that where one is assaulted in his own castle with a deadly weapon he is not compelled to flee, or to resort to such means of escape as may be apparent, but may stand and defend himself, had no application in this case, as the accused was assaulted in his store, to which persons were invited, and where the deceased, therefore, had a right to be. And, besides, the accused was not assaulted with a deadly weapon. *Hall v. Commonwealth* . . . 322
  7. Upon a trial for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis, as it is not the province of the court to weigh evidence for the purpose of determining whether the defendant is entitled to such an instruction. *Bowlin v. Commonwealth* . . . . . 392
  8. Upon the trial of appellant for murder the court did not err in instructing the jury that they could not acquit, upon the ground of self-defense, if they believed from the evidence "that at the time of the killing of deceased the defendant brought on the difficulty with him and sought his life." While the intention with which

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Homicide. Husband and Wife.

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**HOMICIDE—Continued.**

the difficulty was "brought on" must be submitted to the jury in order to prevent such an instruction from misleading, and that intention must be to kill or seriously injure, yet in this case the felonious intent with which the difficulty must be believed by the jury to have been brought on sufficiently appears from the use of the words, "and sought his life." *Johnson v. Commonwealth*. 578

9. Although the killing took place on the premises of accused, he was not prejudiced by an instruction telling the jury that they could not acquit on the ground of self-defense, if he had any "other safe or apparently safe means of escape or protection," as there was at the only time when defendant could, if ever, have reasonably believed himself to be in danger, manifestly no possible avenue of escape from the danger, and it is evident that the jury thought he was never in any danger from which he was required to escape.  
*Idem* . . . . . 578

**HUSBAND AND WIFE—See DIVORCE.**

Devise to "wife and children" construed—See DEVISE, 4.

As to confidential communications—See EVIDENCE, 17.

1. A wife can not by deed, direct to her husband, divest herself of title to real property. *Bohannon, &c., v. Travis, &c.* . . . . . 59
2. Although contracts between husband and wife are at law void, they are not always so in equity. But a contract between husband and wife will not be enforced in equity in favor of either, unless it is fair and just, founded on a valuable consideration, and reasonably certain as to its stipulations, and the circumstances under which it was made. *Idem* . . . . . 59
3. The parties to an ante-nuptial contract stand in a confidential relation requiring the exercise of the utmost good faith. Therefore, there must be a full disclosure of the circumstances and property of each, and if the provision secured to the wife is manifestly unreasonable and disproportioned to the means of the husband, it raises a presumption of intended concealment, and throws upon him the burden of disproving that presumption. *Simpson v. Simpson's Ex'ors* . . . . . 586
4. As advancements made by the husband to his children were not greater in amount than a man of his means had the right to make to his children, they were not a fraud upon the wife.  
*Idem* . . . . . 586
5. To entitle the husband to curtesy in the wife's land it is not necessary that she should in person have been in possession of the land at the time of her death; it is sufficient that another was in possession for her use. *Ellis v. Dittay* . . . . . 620
6. The allegation by the husband in his answer that the wife died "own-

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Husband and Wife. Indictment,

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**HUSBAND AND WIFE—Continued.**

ing and possessing" the land sued for is sufficient, if supported by proof, to sustain his claim to curtesy. *Idem.* . . . . . 620

**IMPEACHMENT OF WITNESSES—See WITNESSES.****INDEMNITY—**

As to liability of surety in executor's bond containing a stipulation indemnifying surety in a former bond against "any loss, cost or damage"—See **SURETIES**, 2, 3.

**INDEX—**

The transcript is condemned for want of a proper index. *Louisville, &c., R. Co. v. Schick* . . . . . 191

**INDICTMENT—**

1. An indictment for a felony created by statute need not allege that the acts complained of were done "feloniously," unless the statute requires that the acts should be done "feloniously" in order to constitute the offense. *Higgins v. Commonwealth* . . . . . 54
2. To constitute a good indictment for willfully and maliciously striking another with intention to kill him, it is not necessary to allege that the person struck was "bruised" thereby, although that word is used in the statute. It is sufficient to allege that the defendant did willfully and maliciously "strike and wound" him. *Johnson v. Commonwealth* . . . . . 341
3. Under the statute punishing as a felony the offense of willfully and maliciously shooting at and wounding another with intention of killing him, an indictment is good, although the word "willfully" is omitted from the accusatory part of the indictment, if it appears in that part of the indictment charging the mode of committing the offense. *Toler v. Commonwealth* . . . . . 529
4. The fact that an indictment for manslaughter charges that the offense was committed "maliciously" does not render the indictment bad on demurrer, as the word "maliciously" is to be regarded as surplusage, it being charged in the same sentence and connection that the offense was committed "in a sudden affray." *Coe v. Commonwealth* . . . . . 606
5. To convict for false swearing under the statute it is essential to allege in the indictment and prove on trial that the false oath was taken knowingly and willfully on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath; and these two facts can be properly shown alone by the record of the proceeding in which the false oath is alleged to have been taken. *Commonwealth v. Davis* . . . . . 612
6. In a prosecution for false swearing, the date of the commission of the offense is not material, and, therefore, a variance between the in-



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Indictment. Injunction.

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## INDICTMENT—Continued.

dictment and the record of the proceeding in which the false oath is alleged to have been taken as to the date of the trial of that proceeding does not render the record incompetent as evidence.

*Idem* . . . . . 612

## INFANTS—See SALES OF INFANTS' REAL ESTATE.

## INJUNCTIONS—

1. An executor may be enjoined from abusing a discretion given him by the will as to the sale of stocks, bonds, &c. *Trimble's Ex'r v. Lebus, &c.* . . . . . 304
2. An appeal lies from a judgment dissolving an injunction where it is rendered on final hearing. *Pendergest, &c., v. Heekin, &c.* . . . 384
3. When on final hearing an injunction has been dissolved, the execution by plaintiff of a supersedeas bond and the service of an order of supersedeas leave the injunction in full force, and the defendant is, guilty of contempt if he disregards it. *Elizabethtown, &c., R. Co. v. Ashland, &c., Street Railway Co.* . . . . . 478
4. As a judgment dismissing plaintiff's petition and dissolving his injunction disposed of all the issues in the case, it was final, although a counter-claim filed by defendant was not in terms disposed of. *Idem.* . . . . . 478
5. When on final hearing an injunction is dissolved, the right to apply for reinstatement does not exist, although time be given for that purpose. The only remedy is by appeal. *Idem.* . . . . . 478
6. Where a railroad company has enjoined a street railway company from crossing its track at a certain point, the fact that the plaintiff is about to construct an additional track at the point of the proposed intersection, and thus change the situation so that the defendant may not be able to enforce its judgment after it shall have obtained it, affords no justification for the defendant's plain violation of the order of injunction. *Idem.* . . . . . 478
7. The appellee, having constructed its road across the track of appellant at the point where it had been enjoined from constructing its road, is in contempt, and the only process of purging the contempt is to remove the obnoxious track. *Idem.* . . . . . 478
8. Injunction against a threatened nuisance will not be granted when the thing complained of is not *per se* a nuisance, but may or may not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury.

The opening of a beer garden, dancing hall and bowling-alley in a city will not be enjoined, although the same place of amusement as formerly conducted may have been a nuisance. *Pfingst, &c., v. Senn, &c.* . . . . . 556

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 Insanity. Insurance.
 

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**INSANITY—**

1. The insanity of the wife does not entitle the husband to a divorce. *Pile v. Pile* . . . . . 308
2. The confinement of a public officer in an insane asylum pursuant to a judicial finding that he is a lunatic, creates a vacancy in the office within the meaning of article 6, chapter 33, of the General Statutes, and an election having been held to fill the vacancy, the former incumbent of the office can not, upon being discharged from the asylum as cured, claim the right to have the office restored to him. *Long v. Bowen* . . . . . 540
3. The offense of unlawfully detaining a woman against her will with intent to have carnal knowledge with her may be committed against an insane woman. *Higgins v. Commonwealth* . . . . . 54

**INSOLVENCY—**

As to right to set-off unliquidated damages against claim of insolvent plaintiff—See **COUNTER-CLAIM AND SET-OFF**.

As to transfer by insolvent debtor in preference of creditors—See **ASSIGNMENTS BY OPERATION OF LAW**.

**INSTRUCTIONS TO JURY—**

Upon trial for murder—See **HOMICIDE**, 1, 2, 3, 8, 9.

Particular error in instruction not prejudicial—See **HOMICIDE**, 9; **RAILROADS**, 5.

Instructions as to measure of damages for personal injuries—See **DAMAGES**, 2.

As to different degrees of offense—See **CRIMINAL LAW**, 1.

As to error in giving peremptory instruction—See **PEREMPTORY INSTRUCTIONS**.

1. An uncontradicted fact may properly be assumed in an instruction. *L. & N. R. Co. v. Earl's Adm'rx.* . . . . . 368
2. Upon a trial for murder, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis, as it is not the province of the court to weigh evidence for the purpose of determining whether defendant is entitled to such an instruction. *Bowlin v. Commonwealth* . . . . . 392
3. An instruction telling the jury they were the judges of the character and credibility of the witnesses was not prejudicial, as the effort of the Commonwealth to impeach the character of defendant's witnesses resulted in establishing overwhelmingly their reputation for truth and veracity. *Johnson v. Commonwealth* . . . . . 578

**INSURANCE—**

1. The possession by an insurance agent of blank policies, signed by the president and secretary of the company, afforded evidence of his general agency sufficient to justify a person to make a contract of Vol. 94—48.

## Insurance.

## INSURANCE—Continued.

- insurance with him, and to accept a policy delivered by him  
Howard Ins. Co. v. Owen's Adm'rx . . . . . 191
2. The power of an agent can not be limited by special private instructions so as to affect a contract of insurance, unless the insured had notice, or there is something in the nature of the business or circumstances of the case to indicate, that the agent acted under such special instructions. *Idem.* . . . . 197
  3. Where an insurance agent was empowered to make contracts of insurance upon property in a certain city and "vicinity," if there were any doubt as to the power of the agent to insure property in a village ten miles distant from the city named, it would be removed by the conduct of the insurance company in sanctioning contracts insuring other property in that village. *Idem.* . . . 197
  4. A verbal contract to issue a policy is valid and enforceable, and if the insured property is destroyed by fire before the issue of the policy under the contract a court of equity having jurisdiction to decree specific performance will, to avoid unnecessary circuitry, adjudge damages just as if the policy had been executed, and an action had been brought on it for loss of the thing insured. *Idem.* . . . 197
  5. The making of a written application for insurance was not a waiver by the applicant of his right to a policy under a verbal contract previously made with the agent through whom the application was forwarded, it being expressly agreed by the agent that the only purpose of the application was to describe the property. Therefore, the fact that the application was rejected by the company, and the agent instructed not to issue a policy, does not affect the right of the insured to recover upon a policy delivered by the agent in express violation of that instruction, as the agent, in delivering the policy, did only what a court of equity would have compelled the company to do. *Idem.* . . . . 197
  6. Where a policy of life insurance was placed by an agent of the company in the hands of a broker through whom the application had been received, to be by him delivered to the insured, the contract must be regarded as completed and binding on the parties, although the applicant died before the policy was delivered to him, the agent having received and appropriated to use of the company the premium which was paid by the insured to the broker; and in this action on the policy the court properly instructed the jury that the policy had been delivered. Mutual Life Ins. Co. of N. Y. v. Thomson, &c. . . . . 258
  7. Upon an application for life insurance an inquiry as to whether the applicant is then temperate in his habits of drinking intoxicating liquors is material; and where a false statement of the applicant as to that matter is relied upon to avoid the policy, it is no answer

## Insurance. Joinder of Actions.

## INSURANCE—Continued.

- upon his part to say that his habits were not such as to injure his health. But an inquiry in regard to previous habits of drinking intoxicating liquors is not material unless they existed to such an extent as to affect the health or physical condition of the applicant, and thereby render him an unsatisfactory subject for life insurance; and the court in this case properly so instructed the jury. *Idem*, 258.
8. In this action by warehousemen to recover the purchase price of tobacco which was destroyed by fire before it was delivered, defendant was entitled to his *pro rata* share of the money collected on open policies of insurance which plaintiffs had obtained prior to the sale to him, and which were in force at the time the warehouse was destroyed by fire, as the policies were not only upon tobacco owned by plaintiffs, but upon tobacco "sold but not delivered." *Thompson v. Brannin, Brand & Glover* . . . . . 490
9. A policy of insurance must be liberally construed in favor of the insured, and where the words are without violence susceptible of two interpretations, that which will cover the loss must in preference be adopted. *American Accident Co. v. Reigart* . . . . . 547
10. The death of a person caused by a piece of beefsteak passing into the windpipe in eating is a death received through "external, violent and accidental means" within the meaning of an accident insurance policy, restricting the right of recovery to cases of death from such means. *Idem*. . . . . 547
11. In an action upon an accident insurance policy, the defendant having attempted to deny that death was caused by the accident as alleged in the petition, the burden was on the plaintiff, and she was entitled to the concluding argument to the jury, and the defendant will not now be allowed to say that its denial was bad, and that as the only defense was that the insured was intoxicated, it was entitled to the burden of proof. *Idem*. . . . . 547

## INTER-STATE COMMERCE—

The statute "to regulate the sale of fertilizers" can not be construed to authorize a levy of an impost on inter-State commerce beyond what is necessary to insure inspection. *Vanmeter v. Spurrier, &c.* . . . . . 22

## JEFFERSON CIRCUIT COURT—

As to jurisdiction of criminal branch—See JURISDICTION.

## JOINDER OF ACTIONS—

1. Where a contract for the shipment of horses owned by different persons was made with the carrier by one person acting as the agent of the several owners, each owner had a separate right of action for the damages suffered by him by breach of the contract, and if

## Joinder of Actions. Judicial and Ministerial Acts.

## JOINDER OF ACTIONS—Continued.

- all had united in one action the defendant would have had cause of demurrer; therefore, the defendant had no right, after separate actions were brought, to demand that they be consolidated. *Baughman, &c., v. Louisville, &c., R. Co.* . . . . . 150
2. Joint owners of land among whom there had been a division, had the right to repudiate that division and bring a joint action for the recovery of the land and for another partition. *Smith, &c., v. Norment, &c.* . . . . . 624

## JUDGES—

As to election of circuit judges—See ELECTIONS, 8.

## JUDGMENTS—

1. The judgment of a county court closing a public road is conclusive as to parties to the proceeding until set aside or reversed. *Bradbury v. Walton, &c.* . . . . . 168
2. A common law judgment against a *cestui que trust* rendered in an action to which the trustee was not a party does not bind the trustee, and he may resist its enforcement against the trust estate upon the ground that the contract upon which it was rendered was void. A proceeding against either the trustee or *cestui que trust* has no effect upon the other, both being essential to the determination of any action in reference to the trust estate. *Roberts v. Yancey, &c.*, 243
3. Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute. *Mercantile Trust Co. v. South Park Residence Co.* . . . . . 271

## JUDICIAL AND MINISTERIAL ACTS—

1. Those duties of a public officer are ministerial in the performance of which he is vested with no discretion, even though such performance requires exercise of discretion. But where such officer may exercise both discretion and judgment as to how a duty is to be performed, the performance of the duty is judicial, though being at the same time ministerial. *Louisville Water Co. v. Clark, sheriff.* . . . . . 47
2. Under the revenue law as it existed prior to the law of May 17, 1886 (sec. 2, art. 7, chap. 92, Gen. Stat., old edition), the county court had jurisdiction to correct assessments in every case where it appeared that a person was charged with any tax or county levy for which he was not legally bound, and the judgment or order of the court correcting or vacating the assessment was not a ministerial, but a judicial act, and until reversed or vacated, was conclusive as to the legality of the assessment. *Idem* . . . . . 47

## Judicial and Ministerial Acts. Jury.

**JUDICIAL AND MINISTERIAL ACTS—Continued.**

3. The action of the county judge upon an application by school trustees for a writ of *ad quod damnum* for the purpose of condemning land on which to build a school-house is judicial and not ministerial. Wright, &c., v. Baker . . . . . 848

**JUDICIAL SALES—**

- As to right of chancellor to order sale of real estate held in trust for life of one person remainder to another—See **LIFE ESTATES**, 1.  
Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute. Mercantile Trust Co. v. South Park Residence Co. . . . . 271

**JURISDICTION—**

- As to venue of actions—See **VENUE**.  
As to waiver of objection to jurisdiction—See **CHANGE OF VENUE**, 2.  
While a civil action can not be instituted in or transferred to the criminal branch of the Jefferson Circuit Court, the judge thereof may be empowered by statute, as has been done, to hear and determine, according to prescribed rules, a case pending in any other branch when the ends of justice require it. Mengle, Jr. Bro. Co. v. Jackson, Judge. . . . . 472

**JURY—**

- As to instructions—See **INSTRUCTIONS TO JURY**.  
As to questions for—See **QUESTIONS FOR COURT AND JURY**.  
As to right to trial by jury—See **TRANSFER OF SUITS**.  
1. A jury may be sent by the court, even after a case has been submitted to them, to view the place where any material fact occurred. Louisville, &c., R. Co. v. Schier . . . . . 191  
2. Irregularity in the formation of the jury or in the mode of summoning it can not be shown by affidavit of the defendant, there being a record easy of access disclosing the facts; and where it appears that the jury was summoned by the sheriff and not by the jury commissioners, it is to be presumed that he performed this service under order of the court as provided by section 11 of article 4, chapter 62, of the General Statutes. Roberts v. Commonwealth . . . . . 499  
3. Decisions of the court upon challenges to the panel and for cause are not subject to exception. *Idem* . . . . . 499  
4. The manner in which the judge is to satisfy himself of the impracticability of obtaining a jury free of bias in the county wherein a prosecution is pending is by making a fair effort to obtain the jury in that county. He can not be controlled and guided by the unsupported affidavit of the defendant. *Idem* . . . . . 499

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 Jury. Life Estates.
 

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**JURY—Continued.**

5. The court did not err in designating two persons other than the sheriff to summon petit jurors after the regular panel was exhausted, such a practice being authorized by section 193 of the Criminal Code. *Idem* . . . . . 499
6. Whether the jury should be sent to view the ground was a matter within the sound discretion of the court. *Idem* . . . . . 499

**KEEPING DISORDERLY HOUSE—See DISORDERLY HOUSE.****LAND—**

As to contracts for sale of—See **FRAUDS, STATUTE OF, 1, 2; VENDOR AND VENDEE.**

As to possession of—See **ADVERSE POSSESSION.**

As to division of—See **PARTITION.**

As to actions to try title—See **EJECTMENT.**

As to right to remove support of neighbor's soil—See **SUPPORT.**

Where one person owns the surface estate in land and another person the mineral interests, each of these interests is real estate and mineral estate may be taxed as any other real estate. *Stuart, Trustee v. Commonwealth* . . . . . 595

**LATERAL SUPPORT—See SUPPORT.****LEGISLATURE—**

As to powers of—See **CONSTITUTIONAL LAW.**

**LETTERS—**

As to competency of letter from husband to wife as evidence against husband—See **EVIDENCE, 17.**

**LICENSE—**

As to duty of railroad company to persons walking on track by license of company—See **RAILROADS, 17.**

The withdrawal of one member of a firm to which a peddler's license has been issued does not deprive the remaining members of the firm of the right to do business under the license. This is not such a transfer of the license as the statute denounces. *Hill v. Thixton, &c.* 96

**LIENS—**

As to waiver of—See **CORPORATIONS, 6.**

As to venue of action to enforce lien—See **VENUE, 2.**

**LIFE ESTATES—**

As to devise creating life estate—See **DEVISE, 8.**

1. Under the amendment of April 15, 1882, to title 10, chapter 14, Civil Code (Carroll's Code, page 241), which provides for the sale by the chancellor of lands held in trust by one person for the life of another, with remainder over to persons not ascertained, or to be as-

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 Life Estates. Local Option.
 

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**LIFE ESTATES—Continued**

- certained until the death of the life tenant, it is sufficient that the persons having a present or vested interest are before the court, and it matters not whether they are plaintiffs or defendants. Nor does this statute require the execution of any bond by guardian or committee. *Craig v. Wilcox's Ex'or* . . . . . 484
2. To authorize a sale under this statute, it is necessary to aver and prove facts showing the sale to be beneficial to all parties concerned. *Idem* . . . . . 484
3. Where a testator by his will places property under the "control" of his executors, with power to them or to the survivor to pay the income to certain persons for life and then to their children, if they have any, the executors are to be regarded as trustees within the meaning of the statute providing for the sale of property held in trust for the life of one person, remainder to persons not to be ascertained until the death of the life tenant. *Idem* . . . . . 484
4. Devise construed to vest in devisees a life estate in one-half his share and the fee in the other half. *Moore v. Offutt* . . . . . 568
5. A remainderman having died before the life tenant, his widow is not entitled to dower or homestead. *Young, &c., v. Morehead, &c.*, 609

**LIFE INSURANCE**—See **INSURANCE**, 6, 7.

**LIFE TABLES—**

As to competency of as evidence in actions for personal injuries  
— See **EVIDENCE**, 5.

**LIMITATION**—See **ADVERSE POSSESSION**.

1. In this action by the heirs of the wife to recover land conveyed by her to the husband, the plea of limitation will not avail, the wife never having been out of possession for a day. *Bohannon, &c., v. Travis, &c.* . . . . . 59
2. The limitation of one year as to the revivor of actions runs only from the term of court at which the order might have been first made, and not from the time of plaintiff's death. *Horsley v. Asher's Heirs* . . . . . 314

**LINEAGE—**

Word *lineage* in will treated as equivalent to heirs. *Lockett, &c., v. Lockett, &c.* . . . . . 289

**LIQUOR SELLING**—See **LOCAL OPTION**.

**LOCAL ACTIONS**—See **TRANSITORY ACTIONS**.

**LOCAL OPTION—**

1. Where the general local option law has been voted into operation in a civil district of which a city formed a part, an amendment to the city charter conferring for the first time authority on the city coun-



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 Local Option—Manslaughter.
 

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## LOCAL OPTION—Continued.

- cil to license taverns and coffee-houses, with the privilege of retailing liquors in the city, repealed the local option law so far as the city was concerned. *Tabor v. Lander, &c.* . . . . . 238
2. The power to license and tax in such a case must mean an exclusive power, and, therefore, the general local option law can not again be voted into operation in the city. But, even conceding that it can be, the vote must be taken in the town alone, and not in the civil district, the amendment to the charter having at least separated the city from the civil district as a political division. *Idem* . . . . . 238

## LOTTERIES—

1. Where one by fraudulent representations obtains possession of a lottery ticket which has drawn a prize, and receives the money thereon, he is to be regarded as collecting the money for the use of the rightful owner of the ticket, who may maintain an action therefor, although he originally purchased the ticket from defendant in violation of law, and parted with it to defendant in exchange for another lottery ticket, the exchange being induced by defendant's fraud. *Martin v. Richardson* . . . . . 183
2. In all such cases every presumption is in favor of the legality of the transaction, and, therefore, it must be presumed, in the absence of proof to the contrary, that the ticket was purchased and exchanged in some place where it was lawful to purchase and exchange it. *Idem* . . . . . 183
3. The allegations of the answer in this case, which are set out in the opinion, fail to show that the lottery ticket in question was purchased or exchanged in Kentucky. *Idem* . . . . . 183

## LUNATICS—See INSANITY.

## MANDAMUS—

1. Mandamus does not lie to compel the county court to probate a will where that court has heard testimony as to the residence of the testator and determined that it had no jurisdiction, the remedy being by appeal to the circuit court. *Preston, &c., v. Fidelity Trust and Safety Vault Co.* . . . . . 295
2. Mandamus does not lie to compel a county judge to issue a writ of *ad quod damnum* for the purpose of condemning land upon which to build a school-house, as his action upon an application by the trustees of a school district for such a writ is judicial and not ministerial. *Wright, &c., v. Baker* . . . . . 343

## MANDATE—See APPEALS, 9.

## MANSLAUGHTER—See HOMICIDE.

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Married Women. Minerals.

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**MARRIED WOMEN—See HUSBAND AND WIFE.**

1. A married woman will be estopped from pleading her inability to contract in bar of the consequences of her own fraud. *Newman v. Moore* . . . . . 147
2. Where a married woman repudiates her contract for the sale of land, the land may be subjected to the payment of the sums paid by the purchaser on the purchase price, and if the vendor has transferred the notes for deferred payments, the assignee of the notes may subject the land to pay what he paid for the notes, but not for their full face value, unless he paid that for them, the measure of recovery being the extent to which he is actually injured or damaged. *Idem* . . . . . 147
3. In an action to enforce a contract for the sale of land, it was error to order a conveyance by the wife of the vendee of her dower in lands which her husband contracted to convey in part payment for the property purchased from plaintiff. *Henderson, &c., v. Perkins* . . . . . 207

**MASTER AND SERVANT—See NEGLIGENCE, 6, 7, 8; RAILROADS, 8-11; STREET RAILWAYS, 1, 2, 3.**

1. The master is not liable for the act of his servant in directing a stranger into a dark room on the premises not used as a passage-way for strangers; and if the stranger is there injured by stepping into an unguarded opening in the floor, he can not recover of the master. And although the stranger may have been seeking the master for the purpose of delivering to him a message from one of his employes, he is to be treated as a mere intruder, so far as the duty or care owed him by the master is concerned. *Lackat, &c., v. Lutz*, 287
2. Where the master is notified by the servant of a defect in the appliances or premises furnished for the servant's use, and promises to remedy the defect, the servant, by continuing in the master's service for a reasonable time after the promise to repair, does not assume the risk, and if by reason of the defect he is injured within that time the master is liable. The servant assumes the risk only where, with knowledge of the defect, he continues in his work without any promise upon the part of the master to repair, or where, although the master has promised to repair, such a length of time has elapsed since the promise was made that the servant has no right to believe that the master intends to comply with his promise. *Breckenridge Company v. Hicks*. . . . . 362
3. An action against a master to recover damages for personal injuries resulting from the negligent driving of his servant survives to the personal representative of the person injured. *Perkins v. Stein & Co.* . . . . . 438

**MINERALS—**

Where one person owns the surface estate in land and another person the

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 Minerals. Negligence.
 

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**MINERALS—Continued.**

mineral interests, each of these interests is real estate, and the mineral interest may be taxed as any other real estate. *Stuart, Trustees, v. Commonwealth* . . . . . 596

**MINISTERIAL ACTS—See JUDICIAL AND MINISTERIAL ACTS.****MISTAKE—**

In execution of receipt "in full settlement" of claim for damages for personal injuries—See **BURDEN OF PROOF**.

**MORTGAGES—**

As to mortgages in preference of creditors—See **ASSIGNMENTS BY OPERATION OF LAW**, 8, 7.

1. Mortgagor presumed to have parted with his title after long continued possession of mortgagees. *Reynolds v. White, &c.* . . . . 156
2. A mortgage is a mere security for debt, and, substantially, both at law and in equity, the mortgagor is the real owner of the property mortgaged. *Mercantile Trust Co. v. South Park Residence Co.* . . . . . 271
3. The wife is not entitled to dower in land of the husband sold to satisfy a lien created by mortgage in which she joined, a mortgage being a "deed" within the meaning of section 5, article 4, chapter 52 of the General Statutes. *Schweitzer v. Wagner.* . . . . 458

**MUNICIPAL CORPORATIONS—See TOWNS AND CITIES.****MURDER—See HOMICIDE.****NATIONAL BANKS—**

As to forfeiture of interest by charging usury—See **USURY**.

**NEGLIGENCE—**

As to loss resulting from escaping sparks through railroad company's negligence—See **RAILROADS**, 1-5.

As to contract exempting common carrier from liability for negligence—See **CARRIERS**, 2.

As to measure of damages for personal injuries resulting from negligence—See **DAMAGES**, 2.

In addition to decisions under this title as to injury to railroad brakeman through negligence of superior—See **RAILROADS**, 8-11.

As to liability of master for injury to servant—See **MASTER AND SERVANT**, 2.

As to negligence of railroad company as to persons walking on track—See **RAILROADS**, 16, 17.

As to negligence of passenger carrier—See **RAILROADS**, 14, 15, 20; **STREET RAILWAYS**, 1, 2, 8.

1. Where one has by negligence in blasting caused injury to his neigh-

## Negligence.

## NEGLIGENCE—Continued.

- bor's land or buildings he is liable in damages. *Lou. & Nash. R. Co. v. Bonhayo* . . . . . 67
2. The attempt to cross a railroad track without looking the one way or the other will, nothing else appearing, be regarded as contributory negligence, but the circumstances may be such as not to require that precaution. And where men of ordinary judgment might differ as to whether the person injured, notwithstanding his failure to look along the track, exercised proper care, the question of contributory negligence is for the jury. *Wright v. Cincinnati, &c., R. Co.* . . . . . 114
  3. The absence of slight care in the management of a railroad train is gross negligence. *Greer v. Lou. & Nash. R. Co.* . . . . . 169
  4. As the only negligence alleged in the petition related to the act of driving or operating the train, it was error to admit evidence as to the unsafe and defective condition of the track or of any portion of the train's make-up. And, although negligence in these regards was not made the subject of an instruction, the evidence was prejudicial, as these circumstances were not detailed as mere incidents of the transaction, but witnesses were introduced solely on these matters, and for the express purpose of making them the basis of a claim for damages. *Idem* . . . . . 169
  5. An amended petition tendered by plaintiff at the appearance term, setting up additional acts of negligence, should have been filed, as it did not change the cause of action; but the court having rejected it, it was error to defendant's prejudice to admit evidence as to such additional acts of negligence, such evidence not being competent under the original petition. *Idem* . . . . . 169
  6. As the plaintiff received his injuries while acting as brakeman, he must, in order to recover, show that he was injured through the negligence of employes who were his superiors in point of authority and control, and also that their negligence was gross, as the only negligence complained of was that of servants associated with him in conducting the cars. It is only when the injured employe and the negligent employe are in different departments of service that a recovery may be had for ordinary negligence. *Idem* . . . . . 169
  7. A fireman, when acting as engineer, is the superior of the brakeman. *Idem* . . . . . 169
  8. It was error to instruct the jury that if the risk and danger of going between the cars was "open and visible" to plaintiff when he went in to do the uncoupling, they should find for defendant. While the brakeman must take the ordinary risk of going between cars when in motion, and such risk is necessarily open and visible, the company is not relieved from liability for the gross negligence of the

## Negligence. Non-residents.

## NEGLIGENCE—Continued.

- conductor and engineer in failing to exercise any care for his protection while thus in peril. *Idem* . . . . . 169
9. Where the view at a railroad crossing in a city was obstructed by a cut, fences, &c., the failure of the railroad company to have either a gate or a watchman at the crossing was negligence, and it would have been proper for the court to so instruct the jury. *Louisville, &c., R. Co. v. Schick* . . . . . 191
  10. The owner of premises is not liable to an intruder for injuries suffered by him by falling into an opening in the floor of a dark room on the premises, although the intruder was directed into the room by a servant of the owner. *Lackat, &c., v. Lutz* . . . . . 287
  11. To authorize a recovery for negligence where there was contributory negligence it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him. It is sufficient that the defendant could, by *reasonable diligence*, have discovered the danger in time to avert the injury. *L. & N. R. Co. v. Earl's Adm'rx.* . . . . . 368
  12. Willful neglect has no place in law except in actions for loss of life under section 8 of chapter 57, General Statutes; and in actions like this to recover damages for personal injuries not resulting in death, the word "willful" should not be used in the instructions in fixing the degree of neglect. *L. & N. R. Co. v. Long* . . . . . 410

## NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES.

## NEW TRIAL—

As to right to new trial on account of excessive damages—See EXCESSIVE VERDICT.

1. There being evidence to support a verdict in favor of plaintiff, the court will not set it aside upon a mere preponderance of evidence in favor of defendant. *Mutual Life Ins. Co. of N. Y. v. Thomson, &c.* . . . . . 258
2. In this action to recover damages for personal injuries, the court had no power to require the plaintiff, in order to avoid a new trial, to accept judgment for a less amount than that found in his favor by the jury, and upon appeal by the defendant from the judgment for the reduced amount, which plaintiff accepted under protest, there must be a reversal, either upon the appeal or cross appeal, as the court should have granted defendant a new trial, if there were errors to its prejudice, and, if not, should have rendered judgment for plaintiff in pursuance of the finding of the jury. *Lou. & Nash. R. Co. v. Earl's Adm'rx.* . . . . . 368

## NON-RESIDENTS—

As to right to set-off unliquidated damages against claim of non-resident—See COUNTER-CLAIM AND SET-OFF, 8.

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Non-residents. Officers.

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**NON-RESIDENTS—Continued.**

Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void, if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute. *Mercantile Trust Co. v. South Park Residence Co.* . . . . . 271

**NOTES—See BILLS AND NOTES.****NOTICE—**

As to necessity for notice of election—See **ELECTIONS**, 1.

As to notice of city ordinance for construction of sidewalks—See **STREET IMPROVEMENTS**.

*Actual notice and constructive notice defined. Chesapeake, &c., R. Co. v. Mullins.* . . . . . 355

**NUISANCE—**

Injunction against a threatened nuisance will not be granted when the thing complained of is not *per se* a nuisance, but may or may not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury.

The opening of a beer garden, dancing hall and bowling-alley in a city will not be enjoined, although the same place of amusement as formerly conducted may have been a nuisance. *Pfingst, &c., v. Senn, &c.,* . . . . . 556

**OBTAINING PROPERTY BY FALSE PRETENSE—**

One who falsely pretends, by the printing of a false letter-head, to be a regular merchant, and thereby fraudulently obtains the property of another, is guilty of the statutory offense of obtaining property by false pretenses. *Taylor v. Commonwealth* . . . . . 281

**OBTAINING SIGNATURE BY FALSE PRETENSE—**

One who induces another to sign a note upon the representation that it is to be used as a renewal of an existing note upon which the person signing is bound, does not violate the statute against obtaining the signature of another to a writing by false pretense, although he intends to and does use the note for another purpose. *Commonwealth v. Warren* . . . . . 616

**OFFICERS—**

As to time for holding election to fill vacancy in office of corner—See **ELECTIONS**, 1.

1. Officer making sale under execution may cry bid left with him by plaintiff. *Brannin, Brand & Glover v. Broadus, &c.* . . . . 38
2. The confinement of a public officer in an insane asylum pursuant to a judicial finding that he is a lunatic, creates a vacancy in the office within the meaning of article 6, chapter 38 of the General Statutes,

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 Officers. Parties to Actions.
 

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## OFFICERS—Continued.

and an election having been held to fill the vacancy, the former incumbent of the office can not, upon being discharged from the asylum as cured, claim the right to have the office restored to him.  
 Long v. Bowen . . . . . 540

3. A sheriff as collector of railroad taxes had absolute control of the money collected by him, and, therefore, had the right to apply it to the payment of a debt he owed; and his sureties who have been compelled to account for his default can not require his creditor who received the money to account to them therefor. *Lee, &c., v. Marion National Bank* . . . . . 41

ORIGINAL ENTRIES—See EVIDENCE, 14.

## OVERRULED CASES—

Stamper v. Commonwealth, 7 Bush, 612 . . . . . 527

## PAROL TESTIMONY—

Competency of, to identify paper referred to as part of will—See WILLS, 3.

## PARTIES TO ACTIONS—

As to joinder of plaintiffs—See JOINDER OF ACTIONS.

Petition of one of several creditors inuring to benefit of all—See ASSIGNMENTS BY OPERATION OF LAW, 1.

1. Both trustee and *cestui que trust* are essential to the determination of any action in reference to the trust estate. *Roberts v. Yancey, &c.* . . . . . 248
2. In an action by a guardian under section 490 of the Civil Code for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party; and, therefore, where he is made a defendant, it is not necessary that he should be served with process. *Howard, &c., v. Singleton* . . . . . 336
3. In an action for the sale of infants' real estate, the sale of land sought for the first time by an amended petition upon which process was not served upon the infants, would have been void had the action been one to which the infants were necessary parties. *Idem.* . 336
4. The trustees of a common school district are created a body-politic, and when they sue as such a body the withdrawal by some of the trustees of their names as plaintiffs does not affect the proceeding. *Wright, &c., v. Baker* . . . . . 348
5. Where street contractors, by a contract with the city for the construction of a street, undertook to keep it in repair for a certain time, the city reserving ten per cent. of the cost as security for the performance of that agreement, in an action by the contractors to recover of the city the amount thus retained, a company which had undertaken with plaintiff to keep the street in repair was not a proper party to the action, that company not being a party to

## Parties to Actions. Partnership.

## PARTIES TO ACTIONS—Continued.

- the contract between plaintiffs and defendant. *City of Louisville v. Muldoon, &c.* . . . . . 462
6. In an action for the sale of real estate held in trust by one person for the life of another, with remainder over to persons not ascertained or to be ascertained until the death of the life tenant, it is sufficient that the persons having a present or vested interest are before the court; and it matters not whether they are plaintiffs or defendants. *Craig v. Wilcox's Ex'or* . . . . . 484

## PARTITION—

1. In an action by a mother for a partition of a tract of land owned jointly by her with her son and daughter, the chancellor properly adjudged a division into two parts—one to be allotted to the son and one to the daughter, the son being required to pay annually such a reasonable sum for the support of his mother as will be sufficient for that purpose when added to what the daughter should contribute. The mother having agreed with her children for a valuable consideration that they should jointly occupy and use the land with her, and at her death have the whole of the tract she is estopped by that agreement, although verbal, to claim one-third of the land absolutely; and being too old to manage any part of the land the allotment of one-third to her for life would be of no benefit to her. *Hessey, &c., v. Hessey* . . . . . 387
2. In this action by heirs for a division of land, to which defendants asserted a claim based upon adverse possession alone, the court will not inquire whether a partition, under which the ancestor of plaintiffs claimed, was made by the number of commissioners then required by the statute, that partition having been acquiesced in by the parties in interest for almost a century. *Smith, &c., v. Norment, &c.* . . . . . 624
3. Joint owners of land among whom there had been a division had the right to repudiate that division and bring a joint action for the recovery of the land and for another partition. *Idem.* . . . . 624

## PARTNERSHIP—

1. The withdrawal of one member of a firm to which a peddler's license has been issued does not deprive the remaining members of the firm of the right to do business under the license. This is not such a transfer of the license as the statute denounces. *Hill v. Thixton, &c.* . . . . . 96
2. Where the name of one of several members of a firm is signed to a note, the firm may be held liable on the note upon parol proof that all the members of the firm assented to the signing of the note in this way in order to raise money for the firm, and that credit was given to the firm. Therefore, in an action against the firm upon



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 Partnership. Per Stirpes Distribution.
 

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**PARTNERSHIP**—Continued.

such a note indorsed by the firm it is immaterial whether such steps were taken as were necessary to hold the members of the firm liable as indorsers, they being liable as makers. *Carter v. Mitchell, Assignee, &c.* . . . . . 261

**PASSENGER CARRIERS**—See **RAILROADS**, 14, 15, 20; **STREET RAILWAYS**, 1, 2, 8.

**PASSWAYS**—

1. The enjoyment of an incorporeal hereditament for as much as fifteen years creates a presumption of legal title; but the time of enjoyment is used merely as evidence to raise the presumption of a grant, and the manner of the enjoyment may be used as evidence to rebut the presumption. *Conyers v. Scott* . . . . . 123
2. Long uninterrupted use by one person of a way over the land of another does not create the presumption of a grant, unless the use has been enjoyed under such circumstances as indicate that it has been claimed as a right, and not merely as a privilege revocable at the pleasure of the owner of the soil. *Idem* . . . . . 123
3. Section 1 of article 2, chapter 94, General Statutes, is unconstitutional in so far as it authorizes the opening of a private passway for the mere purpose of enabling a citizen to pass from a tract of land upon which he resides to another tract owned by him upon which no one resides, the opening of such a passway not being necessary to enable him to attend to his public duties. *Shake v. Frazier* . 143

**PATENTS**—

As to conflicting patents—See **ADVERSE POSSESSION**, 4.

**PEDDLERS**—

The withdrawal of one member of a firm to which a peddler's license has been issued, does not deprive the remaining members of the firm of the right to do business under the license. This is not such a transfer of the license as the statute denounces. *Hill v. Thixton, &c.* . . . . . 96

**PER CAPITA DISTRIBUTION**—See **DEVISE**, 3.

**PEREMPTORY INSTRUCTIONS**—

In action against railroad company to recover damages for injury to plaintiff at a public crossing, the court erred in taking question of contributory negligence from jury and in giving peremptory instruction for defendant. *Wright v. Cincinnati, &c., R. Co.* 114

**PERSONAL REPRESENTATIVES**—See **EXECUTORS AND ADMINISTRATORS**.

**PER STIRPES DISTRIBUTION**—See **DEVISE**, 3.

## Pleading.

## PLEADING—See COUNTER-CLAIM AND SET-OFF.

As to right of plaintiff to prove facts which had been stricken from petition—See RAILROADS, 4.

As to negligence for which plaintiff may recover when petition alleges several distinct acts of negligence—See RAILROADS, 8.

As to pleading in actions for recovery of land—See EJECTMENT.

As to pleading in criminal cases—See INDICTMENT.

1. A petition filed by one creditor seeking to have an act of the debtor declared to operate as an assignment under the statute inures to the benefit of all, and any creditor has the right to proceed under it; therefore, although the petition in this case was dismissed by the creditors who filed it, yet creditors who had been made plaintiffs with them by an amended petition had the right to prosecute the action, and it is not material whether process on the amended petition was served on the defendants. *Baker, &c., v. Kinnaird*. 5
2. A denial that defendant "negligently" did certain things charged in the petition is an admission that it did them and is a denial merely that they were negligently done. *Cincinnati, &c., R. Co. v. Barker, &c.* . . . . . 71
3. The plea of contributory negligence was not inconsistent with the denial of the negligence alleged in the petition, and the defendant had the right to rely upon both defenses. *Idem* . . . . . 71
4. In an action for personal injuries alleged to have resulted from defendant's negligence, an amended petition tendered by plaintiff at the appearance term setting up additional acts of negligence should have been filed, as it did not change the cause of action; but the court having rejected it, it was error to defendant's prejudice to admit evidence as to such additional acts of negligence, such evidence not being competent under the original petition. *Greer v. Lou. & Nash. R. Co.* . . . . . 169
5. Allegations of answer in particular case not sufficient to show that the sale and subsequent exchange of a lottery ticket in question occurred in Kentucky. *Martin v. Richardson*. . . . . 183
6. The court did not abuse its discretion in refusing to permit defendant to file a rejoinder which was not tendered until after the trial was begun. *Owensboro, &c, R. Co. v. Harrison* . . . . . 408
7. In this action against a railroad company to recover land upon which it has constructed its road-bed, in which the defendant claims under a conveyance from plaintiff, an amended answer alleging that plaintiff acquiesced in the building by defendant of its road-bed on its line of road must be regarded as merely a repetition of the allegation of the original answer that the road-bed was built on the land conveyed by plaintiff, and not as a plea of confession and avoidance, and, therefore, defendant can not complain of the action of the court in sustaining a demurrer to the amendment *Idem*, 408  
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Pleading. Practice in Civil Cases.

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## PLEADING—Continued.

8. Where a contractor undertook by contract with a city to construct an asphalt pavement, and to keep it in repair for a term of five years from the completion of the work, the city to retain ten per cent. of the cost as security for the performance of the contract to keep the street in repair, in an action brought at the end of the five years by persons who had succeeded by purchase to the right of the original contractor, seeking to recover of the city the ten per cent. retained, it was essential to the plaintiffs' cause of action that they should allege that the street was kept in repair as covenanted by the original contractor. It was not sufficient for them to allege that they were without knowledge or information sufficient to form a belief as to that matter, or that it was either kept in repair or was not kept in repair, and that they did not know which was true. *City of Louisville v. Muldoon, &c.* . . . . . 462
9. A defendant will not, for the purpose of claiming the concluding argument to jury, be heard to say an attempted denial was bad. *American Accident Co. v. Reigart.* . . . . . 547
10. The allegation by the husband in his answer that the wife died "owning and possessing" the land sued for is sufficient, if supported by proof, to sustain his claim to curtesy. *Ellis v. Dittey* . . . . . 620

## POSSESSION—See ADVERSE POSSESSION.

As to possession necessary to give right to curtesy—See HUSBAND AND WIFE, 5.

## PRACTICE IN CIVIL CASES—

As to right of court to require plaintiff to remit part of excessive verdict—See NEW TRIAL, 2.

As to calling of special term of court—See COURTS.

As to right to concluding argument to jury—See BURDEN OF PROOF, 2.

Defendants not served with process regarded as before the court—See APPEARANCE; CONSOLIDATED ACTIONS.

1. A jury may be sent by the court, even after a case has been submitted to them, to view the place where any material fact occurred. *Louisville, &c., R. Co. v. Schick* . . . . . 191
2. The transcript is condemned for want of a proper index. *Idem* . . . 191
3. There being evidence conducing to support a verdict for plaintiffs, the court will not set it aside upon a mere preponderance of evidence in favor of the defendant. *Mutual Life Ins. Co. of New York v. Thomson, &c.* . . . . . 258
4. As defendant, after discovering the absence of a witness who was present and sworn at beginning of trial, did not exercise proper diligence to coerce his attendance, the court did not abuse its discretion in refusing to permit the witness to testify upon his appearance in

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Practice in Civil Cases. Prejudicial Errors.

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## PRACTICE IN CIVIL CASES—Continued.

- court for that purpose after plaintiffs had closed their evidence, that of defendant having been previously given. *Idem* . . . . . 253
5. The court did not abuse its discretion in limiting the time of counsel in their argument to jury to twenty-five minutes, there being comparatively little conflict of testimony, and the instructions being unusually simple and direct. *L. & N. R. Co. v. Earl's Adm'rx* . . 368

## PRACTICE IN COURT OF APPEALS—See APPEALS.

## PRACTICE IN CRIMINAL CASES—

As to calling of special term of court—See COURTS.

As to application for change of venue—See CHANGE OF VENUE.

As to right to continuance—See CONTINUANCE.

As to summoning jury—See JURY, 2, 4, 5.

1. Whether the jury, upon a trial for murder, should be sent to view the ground was a matter within the sound discretion of the court. *Roberts v. Commonwealth* . . . . . 499
2. It was not error to permit an attorney, other than the regular attorney for the Commonwealth, to state to the jury the nature of the charge against the defendant. *Idem* . . . . . 499
3. The fact that one of the witnesses for the Commonwealth heard the statement of the case is not ground for reversal, the attention of the court not being called to the presence of the witness. *Idem* . . 499
4. A verdict will not be set aside on account of the misconduct of attorneys in argument to the jury where the trial was in other respects fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury. *Houigan v. Commonwealth* . . . . . 520
5. The mandate of the Court of Appeals in a criminal case may issue immediately upon the decision of the appeal. *Nelson v. Commonwealth* . . . . . 594

## PREFERENCE OF CREDITORS—

See ASSIGNMENTS BY OPERATION OF LAW.

## PREJUDICIAL ERRORS—

Error in instruction not prejudicial—See HOMICIDE, 9; INSTRUCTIONS TO JURY, 8; RAILROADS, 5.

Admission of particular testimony not prejudicial—See EVIDENCE, 7, 15, 16.

Refusal of continuance not prejudicial—See CONTINUANCE, 3.

1. Upon a trial for murder, incompetent testimony tending to show that the offense was murder and not manslaughter was prejudicial, although defendant was found guilty of manslaughter only, as it may have influenced the jury in fixing the punishment. *Scott v. Commonwealth* . . . . . 511

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 Prejudicial Errors. Publication.
 

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**PREJUDICIAL ERRORS—Continued.**

2. A verdict will not be set aside on account of misconduct of attorneys in argument to jury where it is apparent no other verdict could have been rendered. *Hourigan v. Commonwealth* . . . . . 520

**PRESCRIPTION—See ADVERSE POSSESSION.****PRESUMPTIONS—**

As to presumption in favor of legality of transaction—*See LOTTERIES*, 2.

Grant from Commonwealth presumed from long adverse possession—*See VENDOR AND VENDEE*, 4.

Presumption that person signing receipt "in full settlement" of claim for damages for personal injuries, understood its meaning—*See BURDEN OF PROOF*.

Fraud in ante-nuptial contract presumed—*See HUSBAND AND WIFE*, 8.

1. Mortgagor presumed to have parted with his title after long continued possession of mortgagees. *Reynolds v. White, &c.* . . . . . 156
2. Where it appears that jury was summoned by the sheriff and not by the jury commissioners, it is to be presumed he performed this service under order of the court as provided by the statute. *Roberts v. Commonwealth* . . . . . 499

**PRINCIPAL AND AGENT—See AGENTS.****PRIVILEGED COMMUNICATIONS—**

As to communications between husband and wife—*See EVIDENCE*, 17.

**PROCESS—**

Defendants before the court without service—*See APPEARANCE; CONSOLIDATED ACTIONS*.

As to necessity for process on amended petition—*See PLEADING*, 1; *PARTIES TO ACTIONS*, 8.

As to warning order in United States courts—*See WARNING ORDER*.

**PROHIBITION—**

As to prohibitory liquor laws—*See LOCAL OPTION*.

The Court of Appeals refuses to grant a writ of prohibition to prevent a circuit court from entertaining jurisdiction of a case, holding that the court has jurisdiction, but does not decide the question as to its power to issue the writ if there had been no jurisdiction in the circuit court. *Preston, &c., v. Fidelity Trust and Safety Vault Co.* 295  
*Mengel, Jr. Brother Co. v. Jackson, Judge* . . . . . 472

**PROXIMATE CAUSE—See RAILROADS**, 2.**PUBLICATION—See WARNING ORDER.**

## Public Policy. Railroads.

## PUBLIC POLICY—

As to contracts against—See **CONTRACTS**, 2-6.

**PUNITIVE DAMAGES**—See **DAMAGES**, 4.

## PURCHASERS—

Preferred creditors not regarded as *bona fide* purchasers—See **ASSIGNMENTS BY OPERATION OF LAW**, 4.

Where one corporation purchases under legislative authority the property and franchises of another, it holds the property free from the claims of creditors of the vendor as if it had been an individual transaction. *Board of Trustees of Elizabethtown v. Chesapeake, &c., R. Co.* . . . . . 377

## QUESTIONS FOR COURT AND JURY—

1. Where the circumstances are such that men of ordinary judgment might differ as to whether a person struck by a train in attempting to cross a railroad track exercised proper care, notwithstanding his failure to look along the track before attempting to cross it, the question of contributory negligence is for the jury. *Wright v. Cincinnati, &c., R. Co.* . . . . . 114
2. Whether the possession of defendants had ripened into a perfect title was a question for the jury, this being an issue out of chancery to try the question of title. *Smith, &c., v. Norment, &c.* . . . . 624

RAILROADS—See **NEGLIGENCE**, 3-8.

As to liability of street railway company for ejection of passenger—See **STREET RAILWAYS**, 1, 2, 3.

1. A land-owner's erection and use of a building for ordinary purposes near a railroad track, although it is more exposed to fire than if it were at a greater distance, is not negligence, and will not deprive him of a right of action against the railroad company for the loss of the building by fire, resulting from sparks escaping from a locomotive through the company's negligence. *Cincinnati, &c., R. Co. v. Barker, &c.* . . . . . 71
2. A railroad company is liable for the destruction of a store-house by fire which spread from its depot, which was ignited by sparks escaping from a locomotive through its negligence. The injury is sufficiently proximate. *Idem* . . . . . 71
3. In this action to recover for such a loss, the denial of the answer that the defendant "negligently and carelessly set fire to its depot" is in effect an admission that defendant did set fire to its depot, and is a denial merely that it was "negligently" done. *Idem* . . . . . 71
4. Although the court struck from plaintiff's petition all allegations as to defendant's negligence growing out of the combustible character of the material in the depot, and defendant's knowledge of the fact, still it was competent for plaintiff to prove the facts thus stricken

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 Railroads.
 

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## RAILROADS—Continued.

- from his pleading, as the question as to whether defendant was negligent in the operation of its locomotive, depended, to some extent, upon the character of the surrounding buildings; and, besides, the combustibility of the depot was a circumstance bearing on the question as to whether the depot was actually fired by the sparks. *Idem* . . . . . 71
5. The jury could not have been misled by an instruction authorizing them to find for plaintiff if they believed the fire was the result of the negligence of defendant in the construction or management of its engine, "or in the construction of its depot." The depot was admittedly fired by sparks which escaped in such quantities as to indicate a disarrangement of the spark arrester, and in whatever way the depot might have been constructed the verdict could not reasonably have been anything else under the pleadings. *Idem*, 71
6. If one approaches a railway track and attempts to cross without looking the one way or the other, no other fact appearing, and is injured, no recovery can be had unless those in charge of the train could have avoided the injury by the exercise of ordinary care, after the danger was discovered. But there may be circumstances which will excuse the failure to look before attempting to cross the track, and if the facts are such that men of ordinary judgment might differ as to whether the person injured, notwithstanding his failure to look along the track, exercised that degree of care that prudent persons would ordinarily exercise under the circumstances, the question of contributory negligence is for the jury. *Wright v. Cincinnati, &c., R. Co.* . . . . . 114
7. Where the view at a railroad crossing in a city was obstructed by a cut, fences, etc., the failure of the railroad company to have either a gate or a watchman at the crossing was negligence, and it would have been proper for the court to so instruct the jury. *Louisville, &c., R. Co. v. Shick* . . . . . 191
8. In this action against a railroad company to recover damages for injuries received by plaintiff while coupling cars in the discharge of his duty as brakeman, although it was alleged in the petition that the conductor was negligent in signaling the engineer to back the locomotive while plaintiff was between the cars, and that the injury would not have been received but for such negligence of the conductor, yet as it is elsewhere in the petition alleged that the injury resulted from the negligent backing of the locomotive, and from defects in the coupling apparatus, the plaintiff was entitled to recover if the injury resulted from negligence in either of these respects, whether the conductor was or was not guilty of negligence in signaling the engineer to back the locomotive. *L. & N. R. Co. v. Foley* . . . . . 220

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 Railroads.
 

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## RAILROADS—Continued.

9. An employer can not escape liability for an injury to a subordinate employe by reason of the defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover the character and condition thereof. The limit of inquiry in such case is whether as matter of fact the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective. And while this rule does not apply where examination and inspection is in the line of the injured employe's duty, yet a brakeman can not be reasonably expected or required to know whether all the machinery and appliances of a railroad train are in proper condition.  
*Idem* . . . . . 220
10. A written agreement by plaintiff to use a coupling stick in coupling cars was not binding, unless the coupling stick was in fact indispensable, or at least clearly necessary for security of brakemen against danger incident to coupling cars; and in determining whether a brakeman was guilty of contributory negligence in failing to use a coupling stick, it is in every case proper for the jury to consider the merit of the coupling stick; and as tending strongly to show that it does not answer the purpose for which it was designed, it is competent to show that it has been generally discarded by brakemen. *Idem* . . . . . 220
11. It was inexcusable negligence on the part of a fireman acting as engineer to leave a detached car standing on the side-track of a railroad in such close proximity to the main track as not to allow a man's body to pass between the car and moving cars on the main track, and a brakeman riding on the ladder of a car on the main track, going from one point of work to another, was not guilty of such contributory negligence as to preclude him from recovering of the company for injuries received by him by being crushed between the moving car and the car on the side-track, it being the custom of brakemen to ride in that way in the discharge of their duties.  
*Lou. & Nash. R. Co. v. Earl's Adm'rx* . . . . . 368
12. In this action against a railroad company to recover land upon which it has constructed its road-bed, in which the defendant claims under a conveyance from plaintiff, an amended answer alleging that plaintiff acquiesced in the building by defendant of its road-bed on its line of road, must be regarded as merely a repetition of the allegation of the original answer that the road-bed was built on the land conveyed by plaintiff, and not as a plea of confession and avoidance, and, therefore, defendant can not complain of the action of the court in sustaining a demurrer to the amendment. *Owensboro, &c., R. Co. v. Harrison* . . . . . 408
13. The defendant can yet have its road-bed condemned as a right of way,



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 Railroads.
 

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## RAILROADS—Continued.

- and the court has the right to suspend the writ of possession for a reasonable time in order for it to take that proceeding if it applies for it. *Idem.* . . . . . 408
14. The servants of a railroad company in charge of a mixed freight and passenger train were guilty of the grossest negligence in leaving the passenger car on the main track at a station without using proper care to flag an approaching freight train in time to avoid a collision. *L. & N. R. Co. v. Long.* . . . . . 410
15. A passenger was not guilty of contributory negligence in entering the passenger car of such a train without notifying the conductor, although the car was fifty feet from the platform, the rules of the company requiring persons taking passage on such trains to get on from the road-bed, or wherever the convenience of those in charge of the train required, and such being the custom of passengers. Nor does the fact that the passengers other than plaintiff were warned of the danger, and succeeded in getting out of the car before the collision, show that plaintiff was guilty of contributory negligence in not doing so. *Idem.* . . . . . 410
16. A railroad company is guilty of willful neglect if it permits cars detached from an engine to move along its track in a city or town without some servant in a position to give warning of the approach of the cars, and to control their movement; and where the company is guilty of such neglect, a pedestrian on the track who is struck by the cars and injured may recover of the company, although he failed to look to see whether cars were approaching. *Lou. & Nash. R. Co. v. Schmetzer, by, &c.* . . . . . 424
17. A person who uses a railroad track as a passway, whether by the license or mere acquiescence of the company, must be held to know the danger attending the running of railroad trains, and to assume the ordinary risks attending such a use of the track. Therefore, where cars have become detached from an engine by accident, and are moving in that way without any servant in position to give warning of their approach, a pedestrian on the track who is struck by the cars and injured can not recover of the company unless the break in the train was due to negligence on the part of the servants in charge, or to some defect in the machinery which the company had failed, after notice, to repair, as such a person can not exact of the company a higher degree of diligence than it owes to an employee. *Idem.* . . . . . 424
18. Where a railroad company has enjoined a street railway company from crossing its track at a certain point, the fact that the plaintiff is about to construct an additional track at the point of the proposed intersection, and thus change the situation so that the defendant may not be able to enforce its judgment after it shall have

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 Railroads. Rescission.
 

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**RAILROADS—Continued.**

- obtained it, affords no justification for the defendant's plain violation of the order of injunction. *Elizabethtown, &c., R. Co. v. Ashland, &c., St. Ry. Co.* . . . . . 478
19. The defendant having constructed its road across the track of plaintiff at the point where it had been enjoined from constructing its road, is in contempt, and the only process of purging the contempt is to remove the obnoxious track. *Idem.* . . . . 478
20. A regulation of a railroad company requiring a passenger entering a train without a ticket to pay twenty-five cents extra fare, this sum to be refunded upon the presentation to any ticket agent on the road of a "rebate check," furnished by the conductor, was not unreasonable; and where a passenger, with knowledge of the rule, and with knowledge of the fact that there was no ticket office at the station for which he was destined, failed, before starting on his journey, to buy a round-trip ticket, which he knew he could procure, he can not complain that upon his return he was ejected from the train on his refusal to pay the twenty-five cents extra fare required by the regulation of the company. *Snellbaker v. Paducah, &c., R. Co.* . . . . . 597

**REAL PROPERTY—See LAND.****RECEIPT—**

As to effect of receipt "in full settlement" for personal injuries  
—See **BURDEN OF PROOF.**

**REMAINDERS—**

- As to right of chancellor to order sale of real estate held in trust for life of one person, remainder to others not to be ascertained until death of life tenant—See **LIFE ESTATES, 1.**
1. A widow is not entitled to dower in a remainder or reversionary interest of the husband in land where there was no seisin by the husband in fact or in law at any time during the marriage. *Carter v. McDaniel.* . . . . 564
2. A remainderman having died before the life tenant, his widow is not entitled to dower or homestead. *Young, &c., v. Morehead, &c.,* 608

**RENTS—**

The purchaser of a dower interest in land, having remained in possession after the death of the dowress, is liable to the heirs for rent from that time. *Carter v. McDaniel* . . . . . 564

**RESCISSION—See VENDOR AND VENDEE, 8, 9.**

Where a married woman repudiates her contract for the sale of land, the land may be subjected to the payment of the sums paid by the purchaser on the purchase price; and if the vendor has transferred the notes for deferred payments, the assignee of the notes may subject

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 Rescission. Sales.
 

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**RESCISSION—Continued.**

the land to pay what he paid for the notes, but not for their full face value, unless he paid that for them, the measure of recovery being the extent to which he is actually injured or damaged. *Newman v. Moore* . . . . . 147

**RES GESTÆ**—See **EVIDENCE**, 7, 11, 12.

**RESULTING TRUSTS**—See **TRUSTS**, 1, 2.

**REVERSIBLE ERRORS—See PREJUDICIAL ERRORS.**

1. There being evidence to support a verdict for plaintiff, the court will not set it aside upon a mere preponderance of evidence in favor of defendant. *Mutual Life Ins. Co. of N. Y. v. Thomson, &c.* . . . 253
2. In criminal cases decisions of the court upon challenges to the panel and for cause are not subject to exception. *Roberts v. Commonwealth* . . . . . 499

**REVERSION—**

A widow is not entitled to dower in a remainder or reversionary interest of the husband in land where there was no seizin by the husband in fact or in law at any time during the marriage. *Carter v. McDaniel* . . . . . 564

**REVIVOR—**

As to survivor of actions—See **SURVIVOR OF ACTIONS**.

An order to revive an action in the name of a representative or successor of a plaintiff may be made at any time within one year from the term of court at which the order might first have been made, as the limitation of one year prescribed by section 509 of the Civil Code was intended to run only from that time, and not from the time of plaintiff's death. *Horsley v. Asher's Heirs.* . . . . . 814

**ROADS—**

As to right to use of passway by prescription—See **PASSWAYS**.

1. The Legislature has power to authorize the county court to close or discontinue public roads without making compensation to the owners of abutting property, although no such power exists as to the streets of a town or city. *Bradbury v. Walton, &c.* . . . 163
2. The judgment of a county court closing a public road is conclusive as to parties to the proceeding until set aside or reversed. *Idem.* . . 163

**SALES—**

As to sales of real estate—See **VENDOR AND VENDEE**.

As to jurisdiction of chancellor to order sale of real estate held in trust for life of one person remainder to another—See **LIFE ESTATES**.

As to insurance by tobacco warehousemen for benefit of purchasers—See **INSURANCE**, 8.

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Sales. Shooting and Wounding.

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**SALES—Continued.**

As to sales under decree of court—See **JUDICIAL SALES.**

As to sales under execution—See **EXECUTIONS.**

- Under a contract for the sale of personal property, if any thing remains to be done by the vendor for ascertaining the weight or extent or price of property sold by him, whether the sale vests the right of property in the vendee presently or not until the thing has been done by the vendor for ascertaining the weight, extent or price of such property, depends upon the intention of the parties manifested by the character of the contract, or circumstances under which it was made; and the question may sometimes be determined by the custom of the trade in respect to a particular commodity. *Thompson v. Brannin, Brand & Glover* . . . . . 490

**SALES OF INFANTS' REAL ESTATE—**

1. In an action by a guardian under section 490 of the Civil Code for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party; and, therefore, where he is made a defendant it is not necessary that he should be served with process. *Howard, &c., v. Singleton, &c.* . . . . . 386
2. In an action for the sale of infants' real estate the sale of land sought for the first time by an amended petition upon which process was not served on the infants would have been void had the action been one to which the infants were necessary parties. *Idem* . . . . . 386

**SCHOOLS—See COMMON SCHOOLS.****SEISIN—**

As to breach of covenant—See **WARRANTY.**

**SELF-DEFENSE—See HOMICIDE, 1, 2, 3, 6, 8, 9.****SET-OFF—See COUNTER-CLAIM AND SET-OFF.****SETTLEMENT—**

As to effect of receipt "in full settlement" for personal injuries—See **BURDEN OF PROOF.**

**SHERIFFS—**

1. Sheriff making sale under execution may cry bid left with him by plaintiff. *Brannin, Brand & Glover v. Broadus, &c.* . . . . . 33
2. A sheriff, as collector of railroad taxes, had absolute control of the money collected by him. Therefore, a bank in which he had the money on deposit had the right, with his consent, to apply it to the payment of a debt he owed the bank, and the sureties in his bond who have been compelled to answer for his default can not require the bank to account to them for the money. *Lee, &c., v. Marion National Bank* . . . . . 41

**SHOOTING AND WOUNDING—See INDICTMENT, 3.**

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Signature. Street Improvements.

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**SIGNATURE**—See **OBTAINING SIGNATURE BY FALSE PRETENSE**.

**SOIL**—

As to right to remove support of neighbor's soil—See **SUPPORT**

**SOLE CORPORATIONS**—See **CORPORATIONS**, 1, 2.

**SPARKS**—

As to loss resulting from sparks escaping from locomotive through railroad company's negligence—See **RAILROADS**, 1-5.

**SPECIAL TERMS**—See **COURTS**.

**SPECIFIC PERFORMANCE**—

As to enforcement of contract for sale of land—See **VENDOR AND VENDEE**, 2-6.

As to venue of action to enforce contract for sale of land—See **VENUE**, 2.

A verbal contract to issue a policy of fire insurance is valid and enforceable, and if the insured property is destroyed by fire before the issue of the policy under the contract, a court of equity having jurisdiction to decree specific performance will, to avoid unnecessary circuitry, adjudge damages just as if the policy had been issued, and an action had been brought on it for the loss of the thing insured. *Howard Ins. Co. v. Owen's Adm'x* . . . . . 197

**STATUTE OF FRAUDS**—See **FRAUDS**, **STATUTE OF**.

**STATUTES**—

As to validity of—See **CONSTITUTIONAL LAW**.

As to repeal of—See **LOCAL OPTION**, 1.

• As to necessity for emergency clause—See **CONSTITUTIONAL LAW**, 3.

As to mandatory provisions—See **ELECTIONS**, 4.

As to retroactive effect—See **COURTS**.

As to provision of Civil Code not applying in criminal cases—See **APPEALS**, 9.

As to provisions of Code construed—See **CODES OF PRACTICE**.

As to provisions of General Statutes construed—See **GENERAL STATUTES**.

**STORM**—

Duty of benefit society as to distribution of fund contributed for sufferers by storm—See **TRUSTS**, 4.

**STREET IMPROVEMENTS**—

As to contract for construction of street, with agreement to keep in repair—See **CONTRACTS**, 9.

1. Where a city charter authorized the city to construct sidewalks and assess the cost of construction against abutting property, provided.

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 Street Improvements. Street Railways.
 

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**STREET IMPROVEMENTS—Continued.**

- the owners of such abutting property should, for the period of fifteen days, have the privilege of doing the work themselves, notice to the lot-owner of the passage of the ordinance or resolution providing for the improvement was necessary in order to give a lien for the cost of construction; but *actual* notice was not required. The passage and publication of the ordinance furnished the owner with constructive notice, which was sufficient. *Chesapeake, &c., R. Co. v. Mullins* . . . . . 855
2. Actual notice is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice. *Idem* . . . . . 855
3. Sections 171 and 174 of the Constitution, requiring uniformity of taxation, do not forbid local assessments to pay for the improvement of streets or the construction of sewers. *Holzhauser v. City of Newport* . . . . . 396
4. A provision in the charter of an orphan asylum exempting its property "from assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the city of Louisville," does not give exemption from local assessments to pay the cost of street improvements. *Kilgus, &c., v. Trustees of Orphanage of Good Shepherd, &c.* . . . . . 489

**STREET RAILWAYS—**

Enjoined from constructing track across railroad at particular point—See **RAILROADS**, 18, 19.

1. Where a street-car driver authorized to make change on behalf of the company delivered to a passenger a package in which there was a shortage of five cents, to which his attention was called, the passenger must be regarded as having paid his fare of five cents, and the driver had no right thereafter to eject him for his failure to put an additional fare in the box, although a rule of the company requiring passengers to put their fares in the box is reasonable, and a passenger may ordinarily be ejected from the car upon his refusal to comply with the rule. Therefore, the company is liable to the passenger for the damage sustained by him in consequence of being ejected from the car. *Curtis v. Louisville City R'y Co.* . . . . 573
2. A request made of the passenger by the driver to adjust the matter with the company was competent to go to the jury in mitigation of damages. *Idem* . . . . . 573
3. What occurred after the plaintiff left the car should not go to the jury, unless it was done by defendant's authority. *Idem* . . . . . 573

## Streets. Sureties.

## STREETS—

As to dedication of—See DEDICATION.

As to power to close—See ROADS, 1.

As to contract for construction of street with agreement to keep in repair—See CONTRACTS, 9.

STRIKING WITH INTENT TO KILL—See INDICTMENT, 2.

## SUBSCRIPTIONS—

As to distribution of contributions for cyclone sufferers—See TRUSTS, 4.

Where a town made a subscription to the capital stock of a railroad corporation in consideration of the company building its machine-shops in the town, a subsequent purchaser of the property and franchises of the corporation did not become bound to continue the machine-shops in the town, and having removed them, the town has no cause of action against it therefor. *Board of Trustees of Elizabethtown v. Chesapeake, &c., R. Co.* . . . . . 377

## SUPERSEDEAS—

When on final hearing an injunction has been dissolved, the execution by plaintiff of a supersedeas bond and the service of an order of supersedeas leave the injunction in full force, and the defendant is guilty of contempt if he disregards it. *Elizabethtown, &c., R. Co. v. Ashland, &c., Street Railway Co.* . . . . . 478

## SUPPORT—

1. Where a land-owner, by digging on his own land, has deprived the land of his neighbor of its natural support, he is, whether negligent or not, liable in damages to his neighbor, not only for the actual injury to the soil, but for injuries to buildings. But where the buildings erected by the neighbor on his land have, by their downward pressure, caused the natural support to give way, he can not recover, either for injury to his lands or the buildings upon it. *Lou. & Nash. R. Co. v. Bonhayo* . . . . . 67
2. Although a land-owner may not have removed the natural support of his neighbor's soil, yet, if by negligence in blasting, he has caused injury to either his neighbor's land or buildings, he is liable in damages. *Idem* . . . . . 67

## SURETIES—

1. The sureties of a tax-collector who have been required to answer for their principal's default can not require a bank to account to them for taxes deposited with it by their principal, and which the bank with his consent applied to the payment of a debt he owed the bank, the collector having absolute control of the money collected by him. *Lee, &c., v. Marion National Bank.* . . . . . 41
2. Where a surety in the bond of a personal representative procures the

## Sureties. Taxation.

## SURETIES—Continued.

- execution of a new bond, containing a stipulation indemnifying him against "any loss, cost or damage legally incurred by reason of said suretyship," if judgment is obtained against him upon the old bond, and he, in good faith, prosecutes an appeal from the judgment, the indemnitor is liable to him for the legal or court costs incurred upon the appeal, and also the damages upon affirmance of the judgment. But unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, the extraordinary costs of the appeal, such as attorneys' fees, are not chargeable to him. *Brandts' Ex'or v. Donnelly* . . . . . 129
8. In an action against the indemnitor upon the bond executed by him, it is no defense that the principal appeared and executed the bond without notice having been served on him. *Idem.* . . . . 129

## SURVIVOR OF ACTIONS—

1. To constitute an assault and battery within the meaning of section 1 of chapter 10 of General Statutes, which provides that actions for assault and battery shall die with the person, the act complained of must be done with a hostile intent. Mere acts of negligence do not constitute an assault and battery within the meaning of the statute, even when trespass would lie. *Perkins v. Stein & Co.* . . . . 433
2. An action against a master to recover damages for personal injuries resulting from the negligent driving of his servant survives to the personal representative of the person injured. *Idem.* . . . . 433

## TAXATION—

As to local assessments for street improvements—See STREET IMPROVEMENTS.

As to time of holding election to take sense of voters as to imposition of tax—See ELECTIONS, 4.

- 1 A railroad company having agreed, as a part of the consideration for the use of land leased by it for a thousand years, to pay the taxes on the land, a statute exempting its property from taxation for five years from the completion of its road does not exempt it from the payment of taxes on the leased property during that time. But the lessor may be compelled to list the property for taxation unless the lessee gives it in. *Commonwealth, for, &c., v. Chesapeake, &c., R. Co.* . . . . . 16
2. As the fees which the statute "to regulate the sale of fertilizers" authorizes to be collected from any person selling or offering to sell a commercial fertilizer, are intended to be used for the single purpose of maintaining the Experiment Station, they can not be regarded as taxes, and do not render the statute liable to the objection that it imposes double taxation. *Vanmeter v. Spurrier, &c.* . . 22



## Taxation.

## TAXATION—Continued.

3. The statute can not be construed to authorize a levy of an impost on inter-State commerce beyond what is necessary to insure inspection. *Idem*. . . . . 22
4. Under the revenue law as it existed prior to the law of May 17, 1886, the county court had jurisdiction to correct assessments in every case where it appeared that a person was charged with any tax or county levy for which he was not legally bound, and the judgment or order of the county court correcting or vacating the assessment was not a ministerial but a judicial act, and until reversed or vacated was conclusive as to the legality of the assessment. *Louisville Water Co. v. Clark, Sheriff*. . . . . 47
5. The fact that at the time the order was made by the county court vacating the assessment, there was pending in the chancery court an action to recover the taxes assessed, did not render the order of the county court void, as the chancery court had no jurisdiction of the subject of that action. *Idem*. . . . . 47
6. An act of the Legislature extending the limits of a town or city will not be declared unconstitutional upon the ground that property thus subjected to municipal taxation derives no benefit from the town or city government, unless it appears that the imposition of the tax amounts to the taking of private property without just compensation. *Board of Trustees of Elkton v. Gill*. . . . . 138
7. Whether the benefit and advantages derived from a municipal government are in a given case *adequate* compensation for local taxation imposed is not the province of courts to decide, legislative determination of that matter being conclusive. *Idem*. . . . . 138
8. Section 167 of the present Constitution limiting the tax rate of towns and cities is not self-operative, and until the towns and cities are classified by the Legislature, their existing charters continue in force, including their tax rates and methods of raising revenue. *Holzhauser v. City of Newport*. . . . . 396
9. Sections 171 and 174 of the Constitution which require uniformity of taxation according to value announce nothing new, but are merely declaratory of what was always the law of taxation in this State, and therefore do not forbid local assessments to pay for the improvement of streets or the construction of sewers. *Idem*. . . 396
10. A statute should never be so construed as to exempt a particular person from taxation for any purpose, unless the language used clearly and expressly requires it to be done.

A provision in the charter of an orphan asylum exempting its property "from assessment and taxation under the revenue laws of the Commonwealth, or under any ordinance, resolution or other act of the city of Louisville," does not give exemption from local assess-

## Taxation. Towns and Cities.

## TAXATION—Continued.

- ments to pay the cost of street improvements. *Kilgus, &c., v. Trustees of Orphanage of Good Shepherd, &c.* . . . . . 439
11. Where one person owns the surface estate in land and another person the mineral interests, each of these interests is real estate, and the mineral estate may be taxed as any other real estate. *Stuart, Trustee, v. Commonwealth* . . . . . 595

## TAX-COLLECTORS—

- A sheriff as collector of railroad taxes had absolute control of the money collected by him. Therefore a bank in which he had the money on deposit had the right, with his consent, to apply it to the payment of a debt he owed the bank, and the sureties in his bond who have been compelled to answer for his default can not require the bank to account to them for the money. *Lee, &c., v. Marion National Bank* . . . . . 41

## TIME—

Variance between indictment and proof as to time of commission of offense—See FALSE SWEARING, 2.

As to time for curing defects in title—See VENDOR AND VENDEE, 3.

## TITLE—

As to title of act of Legislature—See CONSTITUTIONAL LAW, 1.

As to curing of defects in title to land—See VENDOR AND VENDEE, 3.

As to breach of covenant of seisin—See WARRANTY.

## TORNADO—

Duty of benefit society as to distribution of fund contributed for sufferers by storm—See TRUSTS, 4.

## TOWNS AND CITIES—

As to local assessments for street improvements—See STREET IMPROVEMENTS.

As to contract for construction of street with agreement to keep in repair—See CONTRACTS, 9.

As to dedication of streets—See DEDICATION.

1. An act of the Legislature extending the limits of a town or city will not be declared unconstitutional upon the ground that property thus subjected to municipal taxation derives no benefit from the town or city government, unless it appears that the imposition of the tax amounts to the taking of private property without just compensation. *Board of Trustees of Elkton v. Gill* . . . . . 138
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## Towns and Cities. Transfer of Suits.

## TOWNS AND CITIES—Continued.

3. Where a town made a subscription to the capital stock of a railroad corporation in consideration of the company building its machine-shops in the town, a subsequent purchaser of the property and franchises of the corporation did not become bound to continue the shops in the town, and having removed them, the town had no cause of action against them therefor. *Board of Trustees of Elizabethtown v. Chesapeake, &c., R. Co.* . . . . . 377
4. The failure of the purchaser to comply with a provision of its charter requiring it to continue certain trains run by the vendor does not give a right of action to the town for damages on that account. For a violation of that statute the Commonwealth alone can maintain an action. *Idem.* . . . . . 377
5. Section 157 of the present Constitution limiting the tax rate of towns and cities is not self-operative, and until the towns and cities are classified by the Legislature their existing charters continue in force, including their tax rates and methods of raising revenue. *Holzhauser v. City of Newport* . . . . . 396
6. While section 158 of the present Constitution, limiting the indebtedness of towns and cities, does not require legislation to make it operative, yet by the express terms of this section the limitation of ten per centum provided for therein as to certain classes of cities may be exceeded when the proposed indebtedness was authorized under laws in force prior to the adoption of the present Constitution; and there is no limit to this excess; and however great the amount of the existing and authorized liabilities of any town or city at the time of the adoption of the Constitution, there may be an increase of indebtedness beyond that amount to the extent of two per centum upon the value of the taxable property therein. *Idem.* . . . . . 396
7. Section 159 of the present Constitution, which provides that whenever any county, city, etc., "is authorized to contract an indebtedness it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest," etc., requires legislation to make it operative. *Idem* . . . . . 396
7. Sections 173 and 174 of the Constitution do not forbid local assessments to pay for the improvement of streets or the construction of sewers.<sup>3</sup> *Idem* . . . . . 396

## TRANSFER OF SUITS—

Where suit was brought against a city to recover a part of the price of constructing a street which had been retained by the city as security for the performance of an agreement by the original contractors, to whose rights plaintiffs had succeeded, to keep the street in repair for a certain length of time, if an issue had been made as to the street having been kept in repair by the original contractors, it

## Transfer of Suits. Trusts and Trustees

## TRANSFER OF SUITS—Continued.

would have been the duty of the chancellor, upon motion, to transfer the action for trial by jury. *City of Louisville v. Muldoon, &c.* . . . . . 462

## TRANSITORY ACTIONS—

1. While an action to enforce a contract for the sale of land is transitory, yet where the enforcement involves a sale of the land to satisfy a lien thereon, the action is localized and must be brought in the county where the land lies. *Henderson, &c., v. Perkins.* . . . 207
2. Whether the remedy sought by an executrix be for direct recovery of the purchase price of bank stock sold by her under a discretionary power conferred by the will, or for specific performance of the contract of sale, the action is transitory and not local. *Trimble's Ex'or v. Lebus, &c.* . . . . . 304
3. An action for the sale of land belonging to the estate of a deceased person must be brought in the county where the personal representative qualified, if it involves a settlement of the estate and payment of debts or distribution or partition among the heirs, although the land lies in another country. *Walker, &c., v. Yowell's Adm'r* . . . . . 205

## TRIAL BY JURY—

As to right to—See TRANSFER OF SUITS.

## TRUSTS AND TRUSTEES—

1. Where a deed to land is made to one person and the consideration paid by another, no trust results in favor of the person paying the consideration, the law as to resulting trusts having been changed by statute in this State. *Commonwealth, for, &c., v. Chesapeake, &c., R. Co.* . . . . . 16
2. Even under the equitable rule as to resulting trusts, a verbal agreement by the holder of the legal title to land that another shall be interested in the title, or an agreement to buy land from a stranger for the benefit of another without that other paying the consideration, comes directly within the statute of frauds, and does not create an enforceable trust. Besides, in this case the evidence fails to establish the alleged agreement by the holder of the legal title to buy the land for the benefit of another. *Idem.* . . . . . 16
3. A common law judgment against a *cestui que trust* rendered in an action to which the trustee was not a party does not bind the trustee, and he may resist its enforcement against the trust estate upon the ground that the contract on which it was rendered was void. A proceeding against either the trustee or *cestui que trust* has no effect upon the other, both being essential to the determination of any action in reference to the trust estate. *Roberts v. Yancey, &c.* . 243
4. The supreme lodge of a benevolent society having, in response to a

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 Trusts and Trustees. Vendor and Vendee.
 

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**TRUSTS AND TRUSTEES—Continued.**

"distress call" which it had sent out, received contributions from subordinate lodges for the relief of the families of members of the order who had suffered by a cyclone, it had no right to withhold from distribution any part of the fund thus contributed, the persons for whose benefit it was contributed having the right to the whole. And this is true, although the number of persons injured and the extent of their injuries were less than was estimated in the call, there being no such disproportion between the estimates made by the call and the actual facts as to amount to fraud or mistake. *Supreme Lodge Knights and Ladies of Honor v. Owens, &c.* . . . 327

5. The trustees of a common school district are created a body-politic, and when they sue as such a body the withdrawal by some of the trustees of their names as plaintiffs does not affect the proceeding. *Wright, &c., v. Baker* . . . . . 343
6. Where a testator by his will places property under the "control" of his executors, with power to them or to the "survivor" to pay the income to certain persons for life and then to their children, if they have any, the executors are to be regarded as trustees within the meaning of the statute providing for the sale of property held in trust for the life of one person, remainder to persons not to be ascertained until the death of the life tenant. *Craig v. Wilcox's Ex'or.* . . . . . 484

**UNITED STATES COURTS—**

Sale under decree of, void for want of sufficient publication of warning order—See **WARNING ORDER**.

**USURY—**

Under the national banking law a national bank, by taking or charging a usurious rate of interest, forfeits the entire interest which the note or other evidence of debt carries with it. Nor is the forfeiture waived by the giving of subsequent notes. However many renewals there may have been, the interest on the several renewed notes will be traced into the last note and the entire interest eliminated, all partial payments being<sup>1</sup> applied to the principal. *Sydney, &c., v. Mt. Sterling National Bank* . . . . . 281

**VACANCY IN OFFICE—**

- As to time for holding election to fill—See **ELECTIONS, 1.**
- As to creation of by insanity of officer—See **OFFICERS, 2.**

**VARIANCE—**

- As to date of commission of offense—See **FALSE SWEARING, 2.**

**VENDOR AND VENDEE—**

- As to venue of action to enforce contract for sale of land—See **VENUE, 2.**

## Vendor and Vendee.

## VENDOR AND VENDEE—Continued.

As to breach of covenant of seisin—See WARRANTY.

1. Where a married woman repudiates her contract for the sale of land, the land may be subjected to the payment of the sums paid by the purchaser on the purchase price; and if the vendor has transferred the notes for deferred payments, the assignee of the notes may subject the land to pay what he paid for the notes, but not for their full face value, unless he paid that for them, the measure of recovery being the extent to which he is actually injured or damaged. *Newman v. Moore*. . . . . 147
2. Where a contract for the sale of land described the vendor as "of Rocky Hill Station, Ky.," and the property sold as "my home-place and store-house," there was a sufficient memorandum of the contract to take it out of the statute of frauds. *Henderson, &c., v. Perkins* . . . . . 207
3. While possession was to be given on a certain day, yet as the deed was not to be made until the payment of the balance of the purchase money, and there was no tender of the money, the vendee can not resist enforcement of the contract upon the ground that the title was defective at the time fixed for the delivery of possession, the defects having since been cured. *Idem* . . . . . 207
4. Although no grant from the Commonwealth is shown, yet as the chain of title begins in 1835, and the vendor and those under whom he claims have had continuous adverse possession for at least forty years, a grant from the Commonwealth will be presumed. *Idem* . . . . . 207
5. The fact that the store-house purchased by the defendant was burned between the date of the contract and the time fixed for delivery of possession, does not relieve the defendant from obligation to comply with his contract. *Idem* . . . . . 207
6. It was error to order a conveyance by the wife of the vendee of her dower in lands which her husband contracted to convey in part payment for the property purchased from plaintiff, and for this error the judgment must be reversed. *Idem* . . . . . 207
7. Where one corporation purchases under legislative authority the property and franchises of another, it holds the property free from the claims of creditors of the vendor as if it had been an individual transaction. *Board of Trustees of Elizabethtown v. Chesapeake, &c., R. Co.* . . . . . 377
8. Where the purchaser of real estate has made his purchase after having time and opportunity to ascertain for himself the value of the property, and after he has in fact examined it, commendation or even false representation of its value by the vendor does not afford ground for rescission. *Peak, &c., v. Gore* . . . . . 583
9. Vendee, not being in default, entitled to a rescission, when, by reason

## Vendor and Vendee. Vested Interests.

**VENDOR AND VENDEE—Continued.**

of the insolvency of the vendor and the amount of undisclosed prior liens, he is in danger of losing the property by enforced sale, although the unpaid installments of purchase money not yet due may amount to more than the prior liens upon the property.  
*Idem* . . . . . 588

**VENUE—**

As to right to change—See **CHANGE OF VENUE**.

1. An action for the sale of land belonging to the estate of a deceased person must be brought in the county where the personal representative qualified, if it involves a settlement of the estate and payment of debts, or distribution or partition among the heirs, although the land lies in another county. *Walker, &c., v. Yowell's Adm'r.* . . . . . 206
2. While an action to enforce a contract for the sale of land is transitory, yet where the enforcement involves a sale of the land to satisfy a lien thereon, the action is localized, and must be brought in the county where the land lies. *Henderson, &c., v. Perkins* . . . 207
3. Whether the remedy sought by an executrix be for direct recovery of the purchase price of bank stock sold by her under a discretionary power conferred by the will, or for specific performance of the contract of sale, the action is transitory and not local. *Trimble's Ex'or v. Lebus, &c.* . . . . . 304

**VERBAL AGREEMENTS—**

See **FRAUDS, STATUTE OF**.

As to verbal agreement as to land operating as an estoppel—See **PARTITION**.

**VERDICTS—**

As to right of court to require plaintiff to remit part of verdict—See **NEW TRIAL, 2**.

1. A verdict for five thousand dollars is so excessive as to indicate passion or prejudice. *L. & N. R. Co. v. Foley* . . . . . 220
2. There being evidence to support a verdict for plaintiff, the court will not set it aside upon a mere preponderance of evidence in favor of defendant. *Mutual Life Ins. Co. of N. Y. v. Thomson, &c.* . . 258
3. A verdict for \$4,000 for the "pain, anguish, loss of time," &c., suffered by plaintiff's intestate during the ten days he lived after the accident was not excessive. *L. & N. R. Co. v. Earl's Adm'rx.* . . 368
4. A verdict for \$26,000 for personal injuries set aside as excessive. *L. & N. R. Co. v. Long* . . . . . 410

**VESTED INTERESTS—**

As to time of vesting of interest under will—See **DEVISE, 6, 7**.

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 Waiver. Wills.
 

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**WAIVER—**

As to waiver of lien—See **CORPORATIONS**, 6.

As to waiver of objection to jurisdiction—See **CHANGE OF VENUE**, 2.

The making of a written application for insurance was not a waiver by the applicant of his right to a policy under a verbal contract previously made with the agent who forwarded the application. *Howard Ins. Co. v. Owens' Adm'rx* . . . . . 197

**WAREHOUSEMEN—**

As to insurance by tobacco warehousemen for benefit of purchasers—See **INSURANCE**, 8.

**WARNING ORDER—**

Where the land of a non-resident is sold under decree of the United States Circuit Court, the sale is void if it does not appear from the record that publication of the warning order was made for the length of time required by the Federal Statute. *Mercantile Trust Co. v. South Park Residence Co.* . . . . . 271

**WARRANTY—**

1. A covenant of seisin is satisfied only by the transfer of an indefeasible title, and is technically broken as soon as it is made if the title be from any cause defeasible. Therefore, an action for the breach lies at once and before eviction. *Mercantile Trust Co. v. South Park Residence Co.* . . . . . 271
2. The measure of recovery for breach of covenant of seisin is the consideration paid with interest, the recovery being only *pro tanto* where the breach of the covenant is only partial; and where there has been an eviction, the covenantor is also liable for the legal costs incurred in resisting the eviction and for a reasonable fee paid to counsel in defending the action. But where there has been no eviction, the vendee having purchased the outstanding title, there can be no recovery of attorney's fees paid or expenses incurred in obtaining the title. *Idem* . . . . . 271

**WAYS**—See **PASSWAYS**; **ROADS**.

**WILLS—**

As to construction of—See **DEVISE**.

1. Mandamus does not lie to compel the county court to probate a will where the court has heard testimony as to the residence of the testator and determined that it had no jurisdiction, the remedy being by appeal to the circuit court. *Preston, &c., v. Fidelity Trust and Safety Vault Co.* . . . . . 295
2. Whether a writing is a deed or a will depends upon the intention of the maker as gathered from the whole instrument.

The writing in question in this case construed to be a deed taking



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 Wills. Wounding.
 

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## WILLS—Continued.

- effect at once, and reserving to the grantor merely a life estate.  
 Phillips, &c., v. Thomas Lumber Co. . . . . 445
8. Where a paper referred to by a testator as a part of his will is clearly and certainly identified, it is not necessary that it should be probated and recorded with the will in order to give it effect as a part of the will. But a testator having provided in his will for a division of his lands among his children in accordance with "deeds" which he refers to as having been made by him, mere memoranda made by a surveyor and not signed by the testator can not be identified by parol testimony as the "deeds" intended by the testator, as this would be to change by parol testimony the entire character of the instrument referred to as a part of the will. Tuttle, &c., v. Berryman. . . . . 553

## WITNESSES—

As to refusal to permit witness to testify after close of testimony  
 —See PRACTICE IN CIVIL CASES, 4.

Where an affidavit for continuance was read as the deposition of absent witnesses, it was not error to allow the Commonwealth to impeach the reputation of the absent witnesses, as their testimony was placed upon the same footing as that of witnesses who were present. Johnson v. Commonwealth . . . . . 578

WORDS AND PHRASES—See DEFINITIONS.

WOUNDING—See INDICTMENT, 3.







